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THE ORIGIN OF RIGHTS OF COMMON[1].

AS to the origin of rights of common and indeed of manorial rights in general two theories have been held, which may be called the *legal* and the *historical* theories; though one form of the legal theory, that advocated by Mr. Seebohm, professes to rest very much on historical evidence.

The legal theory in its barest and simplest form is that, as the lord of the manor is the absolute owner of the soil in his manor, all the rights which the freeholders and copyholders[2] in the manor enjoy depended originally on the grant or mere will and sufferance of the lord. As expressed by Blackstone[3]: 'On the arrival of the Normans here . . . they . . . might give some sparks of enfranchisement to such wretched persons as fell to their share by admitting them to the oath of fealty; which conferred a right of protection, and raised the tenant to a kind of estate superior to downright slavery, but inferior to every other condition. This they called villeinage, and the tenants villeins.' . . . 'Villeins[4] in process of time gained considerable ground on their lords; and in particular strengthened the tenure of their estates to that degree, that they came to have in them an interest in many places full as good, in others better than their lords. For the good-nature and benevolence of many lords of manors having, time out of mind, permitted their villeins and their children to enjoy their possessions without interruption in a regular course of descent, the Common Law, of which custom is the life, now gave them title to prescribe against their lords, and on performance of the same services to hold their lands,

[1] The following pages form part of a work, to which the Yorke Prize of the University of Cambridge for 1886 was awarded, and which will be very shortly published by the University Press. To it the author must refer for a more detailed discussion of the subject.

[2] Those whose title to their land is by Copy of the Court Roll of the Manor.

[3] ii. 92.

[4] p. 95.

in spite of any determination of the lord's will... Thus it appears that copyholders are in truth no other but villeins, who by a long series of immemorial encroachments on the lord, have at last established a customary right to those estates which before were held absolutely at the lord's will.'

The freeholders in a manor are also alleged to hold in each case by a grant from the lord of the manor; and as all manorial rights in this theory result from the lord's grant, it follows that all are referred to such a grant; even in the case of *Common Appendant*, the right of common possessed by all freehold tenants of land in a manor anciently arable, which is presumed to result from a grant by the lord to each individual freeholder, and not to belong to all freeholders in the manor as a matter of common right[1].

In Blackstone's view therefore, common rights are subsequent in their origin to manors, originating in grants of the land by the lords of those manors, or in sufferance by the lord of practices which become Customs of Common[2].

Mr. Seebohm in his ingenious work on the English Village Community has amplified and corrected this view. He states his conviction that the ordinary Saxon estate was held of a lord, with a community, servile in its tenure, cultivating the land under him; and that this estate became with very slight changes the Norman manor. He further contends that the progress of the tenants on such estates was from almost complete slavery and the duty of rendering unlimited personal services to their lords, through a stage of personal services at first limited, and then commuted for money payments, to practical independence. That these tenants were organised on the agricultural system of open fields and common tillage he agrees, and indeed is the first to satisfactorily explain. He argues that freehold tenants on the lord's demesne did not exist at the time of the Conquest, except in the *socmanni* and *liberi homines* of the Danish and Eastern Counties[3]. It would seem to follow that, except in the Danish districts, Common Appendant did not come into existence till after Domesday, and then only as incident to a grant from the lord; and that as to their common rights the villeins also from the first, and especially at the first, were dependent on their lord's will.

The great importance of this view is that it meets a vigorous and, it was thought, successful attack from the historical point of view

[1] *Earl Dunraven* v. *Llewellyn*, 15 Q. B. 791, discussed by Mr. Joshua Williams in Appendix C. to Williams' Real Property. See also *Tyrringham's case*, 4 Rep. 37, for Lord Coke's view of the matter.

[2] Bl. ii. 33.

[3] e. g. at Thetford, a very Danish town, there are and were very few copyholders. Blomefield, Norfolk, ii. 47, 59.

made upon the general theory of the English law, as expounded by Coke and Blackstone, and meets it upon its own ground and with considerable success.

This historical theory of Common rights is based upon the conception of the Mark, or Teutonic Village Community of Freemen, cultivating and owning their land in common. It professes to trace the degeneration of this free community through the aggrandisement or ancestral superiority of one of its members, who ultimately becomes its lord, the Mark of Freemen becoming the Manor of Villeins[1]. This view of the free institutions before the Conquest would seem to conflict very materially with the legal theory of common rights. For if it be approximately correct, these common rights and especially Common Appendant, instead of being referred to grants from or sufferance by the lord, are older than the lord, and are survivals of the old free community cultivating its land in common. This view was suggested by Mr. Joshua Williams[2], and also by Mr. Kenelm Digby, who states the position thus: 'The common or uncultivated land of the township was in process of time regarded as the sole property of the lord of the manor, and was called the lord's waste, and the old customary rights of the villagers came, as notions of strict legal rights of property were more exactly defined, to be regarded as rights of user on the lord's soil[3].'

It is in answer to this doctrine, which until the publication of Mr. Seebohm's book was accepted as giving the orthodox and almost unquestioned historical origin of manors, that Mr. Seebohm's views have their importance in the controversy. He maintains that the Saxon conquerors found in England a system of agriculture in form manorial, and simply supplanted the wealthy British landowners at the head of this system. He admits occasional settlements by tribal households but treats them as exceptional, and he apparently allows a freer element to exist in those Eastern Counties where the Danish settlements were made, but with these exceptions he repudiates the existence of independent village communities in England.

It has been, I think, rather too hastily assumed that the legal and historical theories are in conflict. If what I have called the legal view be confined to the period following the grant or regrant

[1] Alleged survivals of the free community are seen in such Domesday entries as 'Decem taini tenent Chimedecome. Ipsi tenuerunt T. R. E. pro uno manerio' (f. 84, b), or in more recent times, 'The township of Childer-Thornton, 8 miles N. N. W. from Chester, is divided between several freeholders who exercise manorial rights in rotation. The township of West Kirby, 18 miles from Chester, belongs to several freeholders who are lords of the manor in rotation.' Lysons, 654, 668, cited by Morgan, England under Normans, p. 149; which see.

[2] Williams on Rights of Commons, pp. 47, 57, et seq.

[3] Digby, R. P., 3rd ed., p. 155.

of almost all the land of England by William the Conqueror, while the so-called historical view is limited to the period preceding such grant, I see no reason why the two should not consistently be held by the same writer, especially if the historical theory be adopted with the corrections and limitations rendered essential by Mr. Seebohm's work. For the whole strength of the historical view is derived from the survivals in later English legal and economic history of incidents which it is suggested can only be explained by the truth of such a historical view.

Thus the text-writers and cases from Domesday onward clearly show that there exists an organisation of some kind, the *villa* or town, neither conterminous nor identical in constitution with the manor.

The dissimilarity of the manor and vill, and the importance attached to the vill, are obvious. In Glanvil the term *manerium* only occurs in one sentence[1]: but wherever he gives the form of a writ, the land is to be demanded in some *villa*[2]. And that the *villa* is a place and not a jurisdiction or system of tenure seems clear from two other passages[3]: 'Summone 12 liberos et legales homines de vicineto de illa *villa*;' and the direction as to a woman complaining of rape, who 'mox dum recens fuerit maleficium vicinam *villam* adire debet.' Bracton leaves no doubt upon the point. In explaining a gift he says: 'Item per hoc quod dicit *in tali villa* vult quod certus locus comprehendatur in quo res sita est quae datur[4]:' and later on he expressly distinguishes *villa* and *manerium*[5]: 'Videndum igitur quid mansio, quid *villa*, quid *manerium*.' And he goes on to consider the case: 'Item si plures villae sint in uno manerio.' Britton also repeats the distinction: 'Car en une vile porrount estre plusours paroches, et en une paroche plusours maners et hameletz plusours porrount apendre a un maner[6].'

From this it will be seen that the vill and manor were not only not synonymous, but they were not different aspects of the same thing. One manor might include many vills, or there might be several manors in the same vill. The manor of Taunton Dene covered four hundreds.

The term *manerium* seems sometimes used for the whole Honour, Hundred, or holding of the chief lord; sometimes for a single holding, whether or not commensurate with a vill or township, held of the chief lord; sometimes for a collection of such holdings which their lord for convenience had treated as one manor, holding the Courts for all in one of them[7]; sometimes merely a dwelling or mansion-house.

[1] Gl. vi. 17. [2] Gl. xii. 13. [3] Gl. xiii. 4; xiv. 6.
[4] Br. f. 35. [5] Br. f. 434; cf. f. 212. [6] Brit. ii. 19. 4.
[7] Cf. the Manors of Colne, Ightenhill, Accrington, etc. in Whalley; Whitaker, i. 229.

In the *vill* we have the township, which the Bishop of Chester treats as the unit of the Anglo-Saxon polity, and which had in itself public duties in criminal administration apart from any relation to a lord. The goods of fugitives were to be delivered 'a la *ville* pour nous en respondre[1].' If a prisoner escape from the 'garde de aucun *ville*, se soit la *ville* en nostre merci[2].' The *ville* gave its verdict[3].

The manor and the vill being established as different institutions, if the vill or township can be shown to exist prior to the manor, if the township or village community is older than the lord, it is said that we have a historical account of the origin of common rights which at any rate adds an important supplement to the legal theory, if it does not actually contradict it[4].

By what process can the township or independent village community, if it existed, have grown into the manor, or come into the hands of the lord of the manor? One obvious answer is, by a grant of the land on which it was settled, made by William to one of the barons who had assisted him in his conquest, and by the confirmation by that baron of the settlers on the land in their ancient position, subject to payments or the rendering of the services to himself. This or a similar process is suggested by Bracton, who says, speaking of the King's demesnes: 'Fuerunt etiam in conquestu liberi homines, qui libere tenuerunt tenementa sua per libera servitia, et cum per potentiores ejecti essent, post modum reversi receperiunt eadem tenementa sua tenenda in villenagio, faciendi inde opera servilia, sed certa et nominata[5].' The difficulty in accepting this view as applying to all manors is that Mr. Seebohm has conclusively shown communities tilling common fields and rendering services and labour in kind 'as they were bid' at least 150 years before the Norman Conquest, and developing by stages which can be traced into the manors of Edward I. Yet there are several isolated facts and rules which are difficult to explain on the hypothesis of the universal prevalence of dependent communities, which have never been anything but dependent.

Traces of an earlier system Mr. Seebohm's theory hardly accounts for are to be found in many entries in Domesday. In Suffolk it is recorded: '*In hundred de Colenes est quaedam pastura communis omnibus hominibus de hundret*[6].' The *homines villae* or *homines qui villam tenebant* appear as the proprietors of lands. In Bedfordshire: 'Hanc terram tenuerunt *homines villae* communiter et vendere potuerunt[7]:' and in the same county: 'In Meldone Johannes de Roches occu-

[1] Brit. i. p. 11 (Nichols' ed.); see also i. 35.
[2] Brit. i. 44.
[3] Ibid. i. 181.
[4] e. g., see Williams on Rights of Commons, p. 47.
[5] Br. f. 7 b.
[6] f. 339.
[7] f. 213 b.

pavit injuste XXV acras super *homines qui villam tenebant*, ut homines de hundreda attestantur[1].' They also constantly occur in the *Abbreviatio Placitorum:* 'Communia pasturae de Askham, quae *homines Askham* clamant[2].'

There are also a number of instances, particularly in the counties under Danish influences, where we seem to see communities of freemen who have just lost their independence, sometimes indeed at a halfway stage in that process. Of entries as to individuals we have such as these: 'Non fuit de feudo sed tantum fuit homo suus[3].' In Norfolk at Dersingham we read: 'In eadem villa tenent 21 liberi homines 2 carucatas terrae et 35 acras, 5 bordarii, 3 carucas, 7 acras prati . . . habet suus antecessor' (the predecessor of the then lord of the manor) 'commendationem tantum, et horum 18, si vellent recedere, daret quisque duos solidos Stigand de omnibus socam[4].' Here we may conjecture that the village community of the 21 liberi homines had put itself under the protection of a more powerful man, at first retaining the ownership of its lands, which it afterwards lost.

There are also many entries in Lincolnshire, a Danish county, and one even yet noted for its relics of common fields, which seem to point directly to common ownership of land by members of a free community. Such is the entry, 'William holds four parts of half a hide[5]:' others hold such fractional parts as 'a fifth part of one hide,' 'nine parts of one hide,' 'two parts of one hide.' These entries seem explicable by the common ownership of land not definitely and finally divided, but subject to redistribution at certain intervals. And a similar phrase appears in Northamptonshire, where 'sex liberi homines tenuerunt T. R. E. Unus eorum vocatur Osgot, *cujus partem terrae* calumniatur Judita Comitissa[6].'

Another difficulty arises from the mode of payment of hidage, which Mr. Seebohm, comparing it with the Roman *tributum* paid by the lord of the *villa*, asserts to have been paid by the lord of the manor for the whole manor, as, if his account of the origin of the manor is correct, would be natural[7]. But there are several instances where the hidage was paid not by the lord but either wholly or in part by the tenants. Thus the record called the 'Black Book of Peterborough,' compiled *circa* A. D. 1125, contains,

[1] f. 214. [2] p. 2.
[3] Cited in Digby, R. P. p. 37, from Kelham.
[4] Blomefield, viii. 17, D. f. 278 b.
[5] f. 223 b. Compare the *hidarii* of Thorpe, Walton and Kirkby, vills in the great manor of Adulvesnasa in Essex, where the services were due from the whole hide, and each hide was owned by a varying number of people. Hale's Domesday of St. Paul's, Int. xxv. In one of the Kentish manors in the Custumal of Battle Abbey, many of the lands are held by *participes*.
[6] f. 226, b. 2. [7] V. C. p. 293.

such entries as these[1]: 'In Burgo sunt 5 hidae et 3 virgae ad geldum regis; et isti homines (villani etc.) adquietant erga regem 5 hidas et unam virgatam[2] . . . In Castre 4½ hidae in dominio, sed villani adquietant[3]. . . . In Pihtesle sunt 5½ hidae ad geldum regis, et dominus adquietat dimidium, et villani dimidiam[4]. . . . In Esctona isti 12 villani tenent duas hidas, sed abbas adquietat unam hidam cum duobus dimidiis villanis[5].' A similar series of entries will be found in the Liber de Consuetudinibus of the vills held by the Abbey of Bury St. Edmunds[6]. While it cannot be said that the payment of hidage by the villeins is conclusive proof of the existence of a Free Community, it is at any rate easier to understand if the villeins had previously formed a free community paying taxes to the king, than if they had always been in the power of a lord.

The Salic law 'De Migrantibus' is frequently quoted as a conclusive proof of the existence of free village communities[7]. It provides that if any one wants to move from one *villa* to another, he cannot do so without the licence of those '*qui in villa consistunt*,' but if he has removed to and stayed in another *villa* twelve months, 'securus sicut et alii vicini maneat,' from which the inference has been drawn that those who 'in villa consistunt' and the 'alii vicini' were free village communities. There is however a curious English parallel to this law. According to Glanvil, 'si quis nativus quiete per unum annum et unum diem in aliqua villa privilegiata manserit, ita quod in eorum communem gyldam tanquam civis receptus fuerit, eo ipso a villenagio liberabitur[8];' and in Bracton we read of fugitive villeins protected: 'hujusmodi privilegio, quia manentes in civitate aliqua vel villa privilegiata vel dominico domini regis per unum annum et unum diem sine clamio[9];' which Britton expands into[10] 'Villeins ausi porrount recoverer estat de fraunchise par la negligence del seignur, cum si acun soeffre son villein . . . a demorer en nos demeynes par un an et un jour sauntz chaling qe en acun tens nous fust communement graunté pur nostre profit et pur emendement de nos villes.'

It is not quite clear in the Salic Law which vill must consent, the *villa* which the man has left, or that which he has settled in; in the English version the lord of the vill left must make no claim, and certainly those of the vill in which the emigrant settles must consent to the admission to their gild, spoken of by Glanvil. At any rate, in the light of this parallel there seems nothing in the law

[1] Camden Society, Liber Niger Monasterii S. Petri de Burgo, No. 47.
[2] p. 161. [3] p. 163. [4] p. 161. [5] p. 162.
[6] Made about 1184 A.D. Set out in Introduction to Gage's Suffolk, p. xii.
[7] Lex Salica, § 45, cited by Seebohm, V. C., pp. 259, 260.
[8] Glanvil, v. 5. [9] Br. f. 190 b. [10] Brit. I. xxxii. § 8.

De Migrantibus necessarily involving a free community. The English law was constantly acted upon.

The bulk of these facts however are I think only explicable on the assumption of at least some free village communities existing up to the time of the Norman Conquest, at any rate in the Danish and a few adjoining counties. But there is one rule which is difficult to understand on any view of the facts.

A manor cannot exist without a Court Baron; 'which is the chief prop and pillar of a manor, which no sooner faileth but the manor falleth to the ground; it is as ancient as manors themselves[1]:' and the Court Baron cannot exist without at least two freeholders; 'two free suitors *adminimum*.' For 'if a manor be, and all the freeholders but one escheat, or if the lord purchase them, it is no manor and there cannot be a Court Baron with one suitor only[2].' This rule appears to be at least as old as Domesday: at Ordwell we read, 'Hanc terram tenuerunt sex sochemanni. Tres istorum sochemannorum accommodavit Picotus Rogerio Comiti *propter placita sua tenenda*, sed postea occupaverunt eos homines comitis et retinuerunt cum terris suis sine liberatore[3].' A similar instance is referred to in 1294[4]: 'Nota ad hoc quod homo potest habere curiam, oportet quod habeat 4 liberos tenentes ad minus, sine mutuacione quarti tenentis;' and the failure of the Court for want of suitors is often referred to: Bracton says, 'quia ipse dominus nullam curiam habet[5];' which Britton expands, 'si le seignur ne eyt mie sutiers dunt la enqueste puse estre prisi suffisauntment.'

But if the Court Baron is essential to the manor, and free tenants are essential to the Court Baron, there must, one would think, have been free tenants from the origin of manors. Yet in the Domesday Survey of 1086 we find at any rate one great class of free tenants, the *liberi homines* and *socmanni*, only existing in a manor in local and exceptional cases. In Domesday, only in ten counties do these two classes exceed three per cent. of the population; and those counties in which they are the most prominent are the Eastern Counties and those most subject to Danish influences. Mr. Seebohm infers that 'the *liberi homines* and *socmanni* were of Danish or of Norman origin, and was probably the Court Baron itself; whilst in those districts of England not so much under Danish or Norman influence, the demesne lands were not let out until a later period to permanent freeholding tenants[6].'

[1] Coke, Complete Copyholder, p. 57.
[2] Kitchin, Courts Leet and Baron (1663), p. 7.
[3] Domesday, f. 193 b.
[4] Y. B. 21 & 22 Edw. I. p. 527. The reason that one cannot be borrowed is, that if a false judgment be given by the four and there be an attaint, the fourth would not suffer any punishment.
[5] f. 329 b.
[6] V. C. p. 88.

But if this is so we are placed in this position, that, though free tenants were essential to a Court Baron, and the Court Baron was essential to a manor, by the common law, which 'generally represents very ancient custom,' yet at the time of the Conquest, when all England was covered, according to Domesday, with *maneria*, this characteristic of free tenants was lacking in all manors, except some of those in counties specially susceptible to Danish influence. For though it is true that in Bracton's time freemen may hold tenements in villeinage, retaining their personal freedom, yet in Mr. Seebohm's view the *villanus* with his 'servile services' (p. 97) was 'a serf,' gradually rising to customary freedom, and belonging to a community which had 'a servile origin' (p. 178). It is hard to see why Mr. Seebohm should suggest that the Court Baron was a Norman introduction, as in his view the materials for it only existed in the Danish counties; and there is no special reason why the Normans should introduce such a Court in manors in those counties, but not in manors elsewhere. And if it is to be attributed to Danish sources, it is at least as plausible an explanation to say that the influence of Danish freedom kept alive the older customs in those counties, which in the rest of England were falling into decay.

This being the nature of the Court Baron, Mr. Seebohm's theory requires that it should not come into existence in many parts of England till after the Conquest, unless among the villeins there can be found free tenants from whom a Court Baron can be constituted. It therefore becomes necessary to inquire into the nature of villenage and the position of *villani*.

At the time of Domesday the tenants of lands are divided into (1) tenants *in capite*; (2) tenants holding of them by military service; (3) *liberi homines*; (4) *socmanni*; (5) *villani*; (6) *bordarii* and *cotarii*; (7) *servi*[1]. Of these, the *liberi homines* and *socmanni* are chiefly found in the Eastern and Danish counties, but what the distinction between them is is not very clear.

Neither is it possible to throw much light on the class of *villani*, in their Domesday sense, as both from manor rolls and from text-writers it is clear that the term underwent considerable changes in meaning. For in the Domesday of St. Paul's we have a record of the condition of the manors of the Canons of St. Paul's in the twelfth and thirteenth centuries[2], and the classes of tenants there spoken of by no means correspond to the tenants in Domesday in 1086. In the eighteen manors whose condition is catalogued in the St. Paul's Domesday[3], there are no *villani*, at least not by that

[1] There are a number of minor distinctions here immaterial.
[2] The three surveys are in 1181, 1222 and 1240, the chief record being that of 1222.
[3] Edited by Archdeacon Hale for the Camden Society, No. 69, 1858. The manors are

name, no *bordarii* and no *servi*[1]. In four out of the five Herts manors *cotarii* appear, but by their holdings some of them have changed considerably since their Domesday brethren were enumerated.

The first class of tenants in nearly every manor of St. Paul's in 1222 is the *tenentes de dominico*, who in one manor appear as 'tenentes terras de dominico quae vocantur "*Inlandes*."' They hold all varieties of holdings; in Cadendon, out of twenty-nine *tenentes de dominico* twelve hold half a virgate, three a virgate, and eleven a quarter of a virgate; the services are two ploughings and three reapings a year. In Kenesworth, *debent metere semel in autumno ad cibum domini;* but in most of the other manors, no services, but only money rents, are stated, and the holdings are much smaller, usually under seven acres.

A second broad class of tenants present in nearly all the manors are the *tenentes operarii* or *ad operationem;* these occur in varying forms in at least twelve of the manors; a large number of them usually hold the same amount of land, their services being much heavier than those of the *tenentes de dominico*, as they work a certain number of days a week for the lord. Thus in Sandon we have three classes: *tenentes dimidiae virgatae ad operationem; operarii decem acrarum; operarii quinque acrarum.* In Ardley, *Isti sunt ad operationem;* nineteen tenants holding half a virgate each, working two days a week, except in autumn, when it is one day a week with other services. At Beauchamp the *tenentes terras operarias* hold half a virgate each and owe a number of *operationes*[2] varying with the season. In Sutton the *operarii* hold five acres each, the ordinary holding of a *cotarius* of the Exchequer Domesday; and this fact has led Archdeacon Hale to identify the *tenentes terras operarias* with the *cotarii* and *bordarii* of Domesday[3]. I think this identification cannot be supported. The descriptions of the services and holdings of this class of tenants in most of the manors are almost identical with those of the Saxon *gebur*, whom Mr. Seebohm has shown to be identical with the Domesday *villanus;* and in my opinion this broad class includes those who, though they may be freemen, hold the land in villeinage, or *outland*, by servile tenure[4].

situate, 10 in Essex; 5 in Hertford; 2 in Middlesex; 1 in Surrey, in which counties, at the Exchequer Domesday, the population was as follows:—

Socmanni and *liberi homines:* Essex, 5 per cent.; Hertford, 1 per cent.; Middlesex and Surrey, none.

Villani: Essex, 25 per cent.; Herts, 47; Middlesex, 50; Surrey, 54.

Bordarii and *Cotarii:* Essex, 50 per cent.; Herts, 39; Middlesex, 35; Surrey, 27.

Servi: Essex, 11 per cent.; Herts, 11; Middlesex, 5; Surrey, 11.

[1] There are *nativi a principio* in the manor of Navestock.

[2] These must be less than a day's work, as in August they are eight a week.

[3] Hale, Int. pp. xxiii, xxvi.

[4] In two manors (Walton and Higby), which are very like free village communities,

If we set aside the local and often unintelligible classes found here or there, there yet remain two great classes of tenants. There are first the numerous tenants of *Essart Land*. This was land reclaimed from the lord's wastes and brought into tillage at various times in pursuance of a grant from the lord or by his indulgence[1]. The records of these manors show the tenants of essart land holding a very prominent place; the 'essarts' are denoted by the time when they were made, and we have *tenentes de essarto veteri; tenentes de novo essarto tempore Willielmi*. Sometimes the *terra essarta* is also *assisa*. The holdings are generally small and held apparently only by money rents; while both the *tenentes de dominico* and the *operarii* frequently appear as holding small pieces of essart land in addition to their main holdings.

Lastly, we have the important class of *libere tenentes*, whom Archdeacon Hale identifies with the *villani* of Domesday[2]. But while almost all of the St. Paul's manors in the Domesday record show a large class of *villani*, the *libere tenentes* in 1222 are only present, at any rate under that name, in four manors out of eighteen; in Cadendon and Sandon in Herts, in Beauchamp and Navestock in Essex. They are entirely absent from the Middlesex and Surrey manors; and when we remember that in the Exchequer Domesday there were no *liberi homines* or *socmanni* in Middlesex or Surrey, and but a small proportion in Essex and Herts, we are tempted rather to identify these *libere tenentes* with the *socmanni* and *liberi homines* of Domesday. But a comparison of the two records forbids this identification; for in none of the manors of St. Paul's in the Exchequer Domesday, which are also contained in the Domesday of 1220, are any *liberi homines* or *socmanni* recorded as present; except that before the Conquest 'two *liberi homines* held Navestock as two manors; but since the King came to England St. Paul holds one manor and say they have it from the gift of the King, and have seized the other manor and joined it to the other land.' On the other hand, in almost every one of these manors in the Exchequer Domesday there is a large class of *villani*[3]. Moreover, the services of the *libere tenentes* of 1220, which consists only of

we have *tenentes ad censum et operationem:* each of them at Higby holds a virgate by similar services. In Walton many only hold messuages; but there is the entry: 'terra ista fuit *operaria* usque ad tempore Hugonis, servientis Archiepiscopi, qui primo posuit eam *ad denarium;*' and at Kirkby, one of the same group of manors, the *tenentes ad denaria* hold various numbers of acres (from seventy to two) for money rents, without any customary services stated.

[1] Mr. Williams (p. 231, Rights of Commons) appears to confine assarts to forests, and speaks of them as a grievous offence. In forests an assart was punishable; but in ordinary manors it was perfectly recognised and usual.

[2] Introd. p. xxvi. He identifies *Libere tenentes* with *Villani; Operarii* with *Bordarii* and *Cotarii; Nativi* with *Servi*.

[3] In one or two there are only *bordarii*.

precariae, or works on a small number of specified days[1], are widely different from the services of the *villanus* of Domesday or *gebur* of pre-Conquest records, which always included *week-work*, or contributions of labour on a certain number of days in each week; and this *week-work* is the main feature of the services of the *tenentes terras operarias* in the Domesday of St. Paul's. The identification of the *libere tenentes* of 1220 with the *villani* of 1086 cannot therefore be supported. As the theory of their identity with *liberi homines* or *socmanni* is also untenable, we are reduced to the conclusion that they are a class which did not exist at the time of Domesday. But as a result of the Norman Conquest, all the land of England became the King's land, and every holder of land must hold it by grant, regrant, or confirmation of tenure by the King. In the same way in the districts which the King granted to his barons and supporters, the holder of land must hold it by grant or regrant from the mesne lord; where he does not he holds it of the King[2]. Men who held only of the King, though they were in the manor or land of a lord, are great rarities and are recorded as such. In Northamptonshire, at Erpingham, 'Ipse Gilebertus tenet in eadem villa 7½ hidas et unam bovatam terrae *de soca regis* de Roteland, et *dicit regem suum advocatum esse*[3];' in Kent, 'in hoc manerio tenet unus homo, nec pertinet ad illum manerium, neque *potuit habere dominum praeter regem*[4];' at Raveningham in Norfolk, 'Chetel Friedai, *liber homo regis ad nullam firmam pertinens*, tenet 7 acras[5].' In rare cases the landowner has not made his peace with the King; in Kent we read, 'Excepto isto dimidio solin tenet W. dimidium jugum in eadem villa, *quod nunquam se quietavit apud regem*[6].' If this is so, the *libere tenentes* in the manors under consideration can only have come into existence by the grant of the lord to whom the land had first been granted by the King, probably by individual grant to each *libere tenens;* and their rights of common in the wastes of the manor or elsewhere can only in the first instance have resulted from the lord's grant.

But it is the common rights of these freeholders to which in later law the name 'Common Appendant' is given; and one form of the historical theory alleges them to have resulted from the rights of the members of the free village community against each other, before the community and its members became dependent on a lord. For instance, Mr. Joshua Williams[7], though he admits that in some cases lords of manors have made grants to their tenants, thinks

[1] Seebohm, V. C. pp. 78, 140, 147.
[2] Chron. Sax. A. D. 1086; Stubbs, S. C. p. 82, 3rd ed.
[3] G. D. f. 227, b. 1.
[4] Larkins, Kent, p. 22, l. 9.
[5] Blomf. viii. 51.
[6] Larkins, p. 23, l. 25.
[7] Rights of Common, pp. 38, 39.

that in a great number of cases the origin of Common Appendant was not manorial: . . . in many if not in most cases the origin of Common Appendant is to be traced to the vill, town, or township.' Mr. Digby also considers Common Appendant as the old customary right of the freeholders [1]. But the *libere tenentes*, if their origin is as I have suggested above, have no connexion with the vill, town, or township before the Conquest, except perhaps in those cases where *socmanni* and *liberi homines* exist in the manors at the date of the Exchequer Domesday (and these cases are, as we have seen, a small minority of the English manors). Except therefore in the Eastern and Danish counties we are compelled to attribute the origin of freeholders in a manor, and the common rights they enjoy, to a period posterior to the Conquest and to the lord's grant. In the case of those manors which at the Conquest show *socmanni* and *liberi homines* existing, I think Mr. Williams' view is far more tenable; but in all other manors the relics of the village community must be found, if found at all, in the organization of *villani* and *bordarii*, the descendants of the *geburs* and *cotsetle* of the *Rectitudines Personarum*.

It may be asked whether there are in the manors of St. Paul's *libere tenentes* under any other names, or whether we are to take it that 140 years after the Exchequer Domesday they had only come to be present in four manors out of eighteen. In the first place, we find in the great manor of Adulvesnasa a class of tenants called *hidarii*, whose services are described as due from the hide and not from the tenant, and who do no *week-work* but only *precariae*, though the *precariae* are much heavier than those of the *liber tenens*. One is strongly tempted to see here in the several vills of Thorpe, Walton, and Kirkby in the manor, each with its *hidarii*, three early free village communities. The Exchequer Domesday however only speaks of the presence of *villani* and *bordarii*, and represents Adulvesnasa as always held by St. Paul's as a manor; and it seems that the *hidarii* must correspond to the *villani* in those manors in Domesday. It is very possible that the scribes who made up the Exchequer records from the returns of the commissioners disregarded all local peculiarities and threw the returns into a species of schedule-form under general heads, thus destroying the evidence of many customary rules.

Another class are the *tenentes de dominico;* and it does not seem possible to identify them as *libere tenentes*, for in all the four manors in which *libere tenentes* appear there are also *tenentes de dominico* as a separate class. Except in Cadendon also their average holdings are small; in Beauchamp, forty-four hold on an average four acres each;

[1] Real Property, p. 155.

and the services, where they are specified, are comparatively light, consisting only of *precariae*. In Cadendon the *tenentes de dominico*, who hold more land than in the other manors, 'debent arare bis in qualibet seisione, semel sine cibo domini, altera vice ad cibum domini, si dominus voluerit. Debent etiam serclare, metere ter in anno ad cibum domini.' But in Beauchamp they apparently only pay money rents.

Bracton speaks of a class of '*tenentes adventitii*, qui eodem modo tenent per conventionem sicut et villani sokmanni, sed tales non habebit privilegium sicut alii villani socmanni, nisi tantum per conventionem[1]:' and it is probable, though the matter is far from clear, in this class that we must find the *tenentes de dominico* of the Domesday of St. Paul's, who will hold by agreement, which must be necessarily of a date posterior to the Norman Conquest, and whose rights in the land will depend on the terms of their agreement. What the exact nature of their holding was is a little obscure, *quidam eorum cartas habent et quidam non*[2]. Fitzherbert in 1523 expects to find the same class in manors, but he calls them definitely *libere tenentes, qui tenent per cartam, et qui non;* following in this the Extenta Manerii[3] and Fleta[4], where the steward is directed to inquire, 'De libere tenentibus, quot sunt, et qui intrinseci vel forinseci . . . et per quod servicium, an per socagium, serianciam, vel servicium militare, vel alio modo. Et qui tenent de dominicis veteribus vel novis, essartis novis, vel antiquis . . . et qui tenent per cartam et qui non, et qui per antiquam tenuram et qui per novum feoffamentum.'

The position of the *libere tenentes qui tenent per cartam* is clear; not so that of those who do not hold in that manner; it may be that they hold by copy of Court roll, though the first mention of a Court roll in the Year Books that can be distinctly dated is in 1369; 'le dit J. tient la terre del Prior *per copy de Court roll* a volunte le Prior, pur ce que ce fuit niefe terre[5].'

Fitzherbert also in 1523 speaks of the '*libere tenentes qui non tenent per cartam*' as holding 'by copy of court roll[6].'

I doubt whether there is enough evidence to completely untangle this web of early manorial tenure; but even if we assume the *tenentes de dominico* of the St. Paul's Domesday to be *libere tenentes* and identify them with the *libere tenentes qui non tenent per cartam* of the Extenta Manerii and with the *tenentes adventitii* of Bracton;

[1] Br. f. 209. The privilege was fixity of tenure so long as the services were performed.
[2] Br. 7 b. [3] Hale, p. 153.
[4] Fleta, f. 157.
[5] 42 Edw. III, Mich. pl. 9; see Mr. Pike's Preface to Year Book, 13 & 14 Edw. III, p. xxx.
[6] c. 12.

if following the *Articuli Visitationis* we treat the *tenentes de dominicis veteribus vel novis, de essartis novis vel antiquis* all as freeholders, there still remains the fact that all these tenures must have originated by individual grants from the lord after the Conquest; for even if we take the *antiqua tenura*, which is opposed to the *novum feoffamentum* [1], to refer to the tenure of pre-Conquest *socmanni* and *liberi homines*, a regrant by, or commendation to, the lord is still essential. And therefore if we treat all these classes as possessed of what was afterwards called Common Appendant, yet that Common Appendant still originates from an actual and individual grant in each case from the lord.

And further with regard to the *tenentes in villenagio* and their customary rights, it is indisputable that after the Conquest the land they tilled was granted to new lords, and if their tenure of it was sanctioned by these lords, the tenure was still 'at their lord's will,' and by their lord's sanction, and would be not unfairly described as by their lord's grant.

When therefore Mr. Digby says [2], 'There can be little doubt that the practice of pasturing by inhabitants has descended from very early times, and was in fact a recognised right in the community before the idea arose that the soil was the property of the lord. To the same origin doubtless must be referred most of the rights of a similar character enjoyed by freeholders and copyholders. These rights did not in fact originate in a grant, they were recognised at a time before the notion of the sole ownership of the lord came into existence;' and when he speaks of the 'false historical theory' that such rights must have been created by grant, treating it as a 'creation of the Elizabethan lawyers,' his language needs careful examination and limitation. For he quite accepts the view as to the Conqueror's grants and regrants of all the land of the kingdom, except that held by ecclesiastical bodies [3]; but unless he is prepared to limit this materially, all the land in the kingdom then became in the eye of the law the land of a lord, and any previous landowners who continued their holdings could only do so by the lord's grant or permission. We see as a matter of fact all freeholders in manors coming into existence after the Conquest, and by the lord's grant, except in the cases where *socmanni* and *liberi homines* existed. And it does not follow that these two classes remained after the Conquest as *libere tenentes:* there is an entry in the Exchequer Domesday at Benfleet in Essex, 'In this manor there was T. R. E. a certain *liber homo* holding half a hide, who now is made one of the villeins [4].' And at any rate it is

[1] Ante, p. 386.
[2] R. P. 3rd ed. p. 150, note.
[3] R. P. pp. 33, 34.
[4] II. f. 1 b.

correct to say that all freeholders in a manor owed their land and rights both in law and in fact to grant or regrant from the lord.

Take next the tenants in villeinage; many at any rate, even before the Conquest, formed part of dependent communities; and the only historical evidence of progress we have among this class is of progress from a *villenagium purum* entirely at the will of the lord to a more secure position. It may be that at some earlier period the community was still independent, and had a customary system of rights of common among its members. But except in the Danish counties such a condition of things can only have existed in the very earliest times, and a long while anterior to the Conquest. At the Conquest an almost complete change of ownership took place, and there is no evidence that any particular respect was paid to vested interests or pre-existing rights. It may be that there was a state of things existing which should have given and did give the cultivators a moral claim to the consideration of their lord; but how from the point of view either of law or history their legal rights can be said to originate otherwise than in the express or tacit grant of the lord, it is hard to understand. There is no evidence to support the view that the soil was not treated as the lord's property; in the thirteenth century, at any rate, the freehold of the soil held by tenants in villeinage was treated as being in the lord. Britton defines villeinage in 1292 as 'tenement de demeynes de chescun seigneur, baillé a tenir a sa volunte par villeins services de enprower al oes le seigneur, et liveré par verge, et nient par title de escrit, ne par succession de heritage[1].' And we find the lord in different parts of the country claiming the ownership of the commons and wastes against all strangers. Thus in 1275, at Eccles in Norfolk, William le Parker, lord of the lordship of Hapsburgh, has these liberties belonging to his manor; liberty of *resting-geld* of the beasts of any strangers resting one night in the commons of the said village in shack-time[2]; and common pasture of all cattle; while none of the villagers have any right of common here or any in the said village, except they hold their tenements of the manor, and unless they hire it yearly of the said William[3]. In Lancashire in 1311 there was a like payment called '*Thistle take*,' exacted by lords of manors for the depasturing of drove beasts upon their commons, even if they only stayed to crop a thistle[4]; and a similar payment of one half-penny a beast existed under the same name at Halton in Cheshire[5].

[1] Brit. iii. 2. 12.

[2] tempore aperto.

[3] Blomefield, Norfolk, ix. 93. If it is said that this shows that in 1275 there were inhabitants of Eccles who did not hold of the manor, it may be remarked, (1) Eccles in Norfolk was in a Danish county; (2) the inhabitants may have been forensic tenants of other manors; (3) anyhow the lord refuses to recognise any right of common in them.

[4] Whitaker, Whalley, i. 306.

[5] Hazlitt's Blount, p. 143.

If Mr. Digby's and Mr. Joshua Williams' views as to the origin of Common Appendant are correct, we should expect to find this kind of common recognised as a well-known legal incident from the earliest times. Lord Coke's explanation of its origin is this[1]: 'The beginning of common appendant by the ancient law was in such manner; when a lord enfeoffed another of arable land to hold of him in socage; as every such tenure at the beginning was that the feoffee should have common in the lord's wastes for his necessary cattle which plowed and manured his land, and that for two reasons: (1) because it was, as was then held, *tacite* implied in the feoffment' (because the land could not be ploughed or cultivated without cattle, and they could not be kept without pasture); (2) 'The second reason for the maintenance and advance of tillage; . . . so that such common appendant is of common right . . . and commences by operation of law . . . and therefore it is not necessary to prescribe therein.' Common appurtenant, on the other hand, is against common right, becoming appurtenant to land either by long user or by grant express or implied. Thus it covers a right to common with animals that are not commonable, such as pigs, donkeys, goats, and geese; or a right to common claimed for land not anciently arable, such as pasture, or land reclaimed from the waste within the time of legal memory, or for land that is not freehold, but copyhold[2].

If we trace this distinction backward from the time of Coke, we find Fitzherbert in 1523 distinguishing thus[3]:—

'Common Appendant is where a lord of old time hath granted to a man a meseplace and certain lands, meadowe and pastures, with their appurtenances to hold of him. To this meseplace lands and meadow belongeth common' . . . 'Common appurtenant is where a man hath had common to a certain number of beasts or without number belonging to his meseplace, in the lord's waste. This common appertains by prescription, by cause of the use time out of mind.'

The distinction here appears to be simply between common by grant, and common by long user; but the definitions appear in 1462 in their modern form, and more definitely than in Fitzherbert[4]. Prisot J. said, 'Il est a voir coment le common sera dit common appendant, et ove queux beastes il usera commune appendant, et aver commune a sa terre arable et a ses beastes que gain sa terre et compester sicut chivales, bœufs, pur gainer son

[1] *Tyrringham's case* (1584), 4 Rep. 36 a; at f. 37 a.
[2] Williams, Common, p. 168.
[3] Duty of a Surveyor, c. 10.
[4] 37 Hen. VI. p. 34; Broke, Common, 13: Broke's abstract is more definite than the original Year Book: see also Broke, 12; 9 Edw. IV. 3 (1474).

terre, vaches et berbits pur compester sa terre, et cest common il ne usa ove goates ou geese et hujusmodi, car ceux beastes ne sont compris deins le usage de ce common, et ce common est ameasurable selon le qualite et quantity del franktenement a que il est appendant.' Choke J. continues by suggesting a claim of 'common appendant ove toutes maneres des bestes, scilicet porces, gettes, et hujusmodi auxi bien come chevaux et per consequens nient appendant; mes il poet estre dit appurtenant.' Broke sharpens this in 1576 into—'Mes lou homme claime common pur toutes manieres de beastes, il poit mistier porcels, goates et hujusmodi et hoc est common appurtenant et nemy appendant[1].'

If we now look to the early text-writers we shall be perplexed to find that the distinction apparently does not for them exist. The only words used to describe the connexion of rights of common with land in Glanvil, Bracton, and Fleta, are *pertinere, pertinentia;* and though, as Coke says, the word may conceal the distinction and must be 'construed *subjectâ materiâ*, the circumstances of the case directing the Court to judge the common to be appendant or appurtenant[2];' on the other hand, it may be that one word was used because there was no distinction to be made.

In Glanvil the phrase is, 'Communis pastura in ea villa, *quae pertinet ad liberum tenementum* suum in eadem villa[3].' This appears to refer to what would now be called common appendant, though it may be that another writ, claiming 'aisiamenta sua in pastura de villa illa quae habere debet, *et habere solet*[4],' refers to a claim other than common appendant, and prescription.

Bracton, after dealing with *res corporales*, begins to consider *ea quae sunt de pertinentiis liberi tenementi*[5]; and in his chapter on *Communia Pasturae*[6] says that common of pasture can be acquired in the following ways: (1) *Ex causa donationis:*—si quis dederit terram *cum pertinentiis*, et cum communia pasturae. (Britton reads 'acun soil ovek *common apurteynaunte*[7]'); (2) *Ex causa emptionis et venditionis*, si quis communiam emerit in fundo alieno, ut *pertineat* (Britton, *soit apurteynaunte*), ad tenementum suum, licet sit de feodo alieno et diversa baronia, [et][8] ex constitutione dominorum fundorum; (3) Item acquiritur *ex causa* [dominorum fundorum][9], sicut per servitium certum; (4) Item *ex causa vicinitatis*; (5) Item ex longo usu

[1] Here, though common appendant is defined in the modern way, common appurtenant is only applied to the one variety appearing in the case—for beasts other than commonable.

[2] *Tyrringham's case*, 4 Rep. f. 38. [3] Gl. xiii. 37. [4] Gl. xii. 14.

[5] Br. bk. iv. c. 37: cf. Fleta, iv. 18, De Pertinentiis; Brit. ii. 23, De Apurtenaunces.

[6] Br. f. 222 b. [7] Brit. ii. 24. 3.

[8] Fleta (f. 254) reads tamen, which makes sense.

[9] Fleta and some Bracton MSS. omit these words.

sine constitutione cum pacifica possessione continua et non interrupta . . . ex scientia [negligentia][1] et patientia dominorum.

He says, 'Et eisdem rationibus *pertinere* poterit communia ad liberum tenementum;' and, having enumerated the modes in which common could be acquired, deals next with the kinds of common: 'Item per tempora, ut si omni tempore, vel certis temporibus et certis horis . . . Item per loca, aut si ubique et per totam.' He continues, after an exclusion of common *in dominico alicujus:* 'Item ad certa genera averiorum vel si ad omnimodo averia et sine numero, vel cum coarctatione et cum numero, vel ad certum genus averiorum.' (This includes the subject-matter of one distinction between common appendant and common appurtenant, but with nothing to show that that distinction was fixed.) He goes on[2]: 'Non debet dici communia, quod quis habuerit in alieno, sive per precio, sive causa emptionis, cum tenementum non habeat ad quod possit communia *pertinere:*' and Britton translates 'nul tenement a qui celle commune porra *apendre.*' Here, in the first place, Bracton refuses the title of common to what seems to be in later language a 'common in gross;' and secondly, Britton translates *pertinere* by *apendre* in a case where the opposition is between a servitude attached to land (praedial) and a servitude attached to a person, without any reference to the kind of servitude. Anticipating, it may be said that Britton appears to use *apendre*[3] when a verb is required in his sentence, *apurteynaunte* when he wants an adjective, to express *pertinere* and its derivatives, without any other distinction between them.

I have only found a few passages in which Britton uses the two words in the same sentence[4]. The plaintiff is to state 'a quel tenement il cleyme la commune *appendre;*' for he may have no freehold 'a quei la commune porra *appendre;*' and then (that is, when he states his title), 'il porra dire que la commune est *appurteynante*[5] a son fraunc tenement en telle ville, par la resoun que il de tel tenement fust feffé en quettens icele commune fust *appurtenaunte* a son fraunc tenement.' Here, though it is possible to contend that common appendant time out of mind is distinguished from common appurtenant, I think the more natural construction is that no distinction is made between the two words. In other passages the term *appurteynaunte* is certainly used where we should expect to find *appendant.* Thus to the writ claiming 'commune de pasture

[1] Britton, Fleta, and some Bracton MSS. omit this.
[2] Br. f. 222 b; Brit. ii. 24. 4.
[3] Of varying uses of this verb we have in one paragraph (Brit. ii. 27. 3) . . . 'remedie apent; . . . a li apent de mettre beastes; . . . auntant de commune cum a ly apent.'
[4] Brit. ii. 25. 5.
[5] One MS. reads 'porra apendre e est appurteynaunte.'

appurteynaunte a son franc tenement en telle ville[1],' the author suggests as answers 'le pleyntif ne ad terre ne tenement a qui ceile commune fust unques obligé ne *appurteynaunte*;' or, 'nulle commune est *appurtenaunte* car mesme cel tenement a quel il cleyme commune *apendre* soleit estre foreste... et commune a tous ceux del visne.' Here this would be correct according to modern views in the sense that no common would be appendant to such land, it not being anciently arable, but incorrect because common might by prescription become appurtenant to such land. Britton rarely uses the word *appendant*; e. g. in a passage 's'il furent de acun tenement feffez a quel la commune est *appendante*[2];' with which we may compare 'la commune est *apurteynaunte* a son fraunc tenement en telle ville, par la resoun que il de tel tenement fust feffé[3].'

Judging from Bracton, Britton, and Fleta, there is no distinction then recognised in the law to which the words might apply. All rights of common must belong to some tenement, for Bracton refuses to call 'common in gross' a right of common at all: they may so belong by agreement or usage or service, or neighbourhood[4], and each class may be a right of common at various times, in various places, to various extents. Though the amount of common which pertains to a free tenement is spoken of in general terms, there is no recognition of any special class called or the same as common appendant.

The early Year Books do not seem to support the modern distinction. In 1293[5] a case in which a right of search on a common pasture was claimed by B. 'par la resone que nus tenum une carue de terre en N. a la quelle une cerche en celle commune... est *appendante*,' and by Adam because 'la cerche est *apurtenant* a nostre manere de C.,' contains a pedigree of the land, in which it is said 'nus volums averer ke le cerche est *apendant* a nostre franc tenement en N. par la resoun ke un tel, ke fut tenant celle terre, fut seysi de la cerche cum *apurtenant*, e de ceo enfeoffa un G. od les *appurtenances*; G. enfeffa B., ke ore tent... B. seysi cum *appendant*.' This might suggest either that common appendant was derived from grant, appurtenant from user; or that there was no distinction then existing. That the latter is the truth seems probable from a case a few pages later, in which we read[6]:—

[1] Brit. ii. 26. 4.

[2] Brit. ii. 28. 5.

[3] Brit. ii. 25. 5.

[4] Br. f. 225 b; Brit. ii. 26. 3, 'par title et par usage, et par vicinage.' Comparing this with Fitzherbert and the modern distinction, it reads

appendant . . . par title
appurtenant . . . par usage
par vicinage . . . par vicinage
in gross . . . (not called common).

[5] Rolls Series, Y. B. 21 Edw. I. p. 18.

[6] Ibid. p. 28.

'J. tynt une carue de terre en N. a la quelle terre cette commune de pasture fut *apendant*, memes cely J. enfeffa B. de celle terre od le pasture ke est *appurtenant*.' And again: 'chekun commune de pasture ou il est *apendant* a franc tenement, ou par especialté . . . si je fusse disseysi de commune de pasture, jeo ne porroy jammes aver recoverie par la novele disseysine si elle ne fut *apurtenant*, ou si jeo ne use especialté, e desicom yl ne put dire ke ceo est *appendant*, ne yl nad nul especialté.' Here there seems no distinction whatever between the words.

In 1294 a reporter's note distinguishes the various kinds of common, thus[1]: 'fet a saver ke il y ad commune de pasture *appurtenant* a franc tenement, e commun a certain nombre de bestes nent *apurtenant*, e commune a nent a certain numbre ensemant nent *apurtenant*;' which seems merely to be a distinction between a praedial and a personal right, the common in gross being divided according as it is with or without stint[2].

In 1303[3], a grant of 'manerium cum pertinentis et communam pasturae in M.' is said to pass 'common cum *apendaunt* par cele parole cum pertinenciis; et la commune *comme un gros* par la clause subsequenti:' but the common spoken of here as '*apendaunt*' is called a few lines lower down '*appurtenant*'[4]. In 1303 we have the phrase 'sa commune pasture solum ceo que aver deit ou a lui *apent* a aver solum le franc tenement quil tent en mesme la ville[5];' but it is opposed to *commune cum un gros*, as in the earlier cases. In the reports about this time it seems generaliy to be assumed that if the common cannot show an *especialté* or special grant or title, he must show 'fraunc tenement en la ville a quey commune est *appendant*[6].' Thus we have the question, 'Coment clamez vous commune? Com *apendant*, ou par especialté[7]:' while Hengham J. says, 'prescription de tens, est assez bon especialté[8].'

A little later (1305) it is noteworthy that while one defendant claims common appendant to his freehold, another claims common 'with all manner of beasts by reason of long enjoyment of the right by himself and his ancestors and the tenants of a freehold in R.;' and this is described at the beginning of the case as 'fraunc tenement a quei la commune est *apendant*[9].' In 1307 another case

[1] 22 Edw. I. 365.
[2] See also a case (p. 509) where the same right of housebote is spoken of indifferently as *appendant* or *appurtenant* to land.
[3] 31 Edw. I. pp. 326, 346
[4] Ibid. p. 413.
[5] 32 Edw. I. p. 45; cf. also pp. 190, 226–240.
[6] 32 Edw. I. p. 321.
[7] Ibid. p. 464; cf. the same distinction; Broke, Common, 5; 45 Edw. III. 25 (1372).
[8] p. 430. I think *apendant* refers to grants: *especialte* to claims in gross, or claims by prescription.
[9] 33 Edw. I. p. 372.

affords means for comparing the two terms[1]. The lord of the vill had seized cattle in the common pasture for services due from a tenement in the vill, claiming that he might so make distress in the 'commune *appendaunt* al soil dount sa rent ist;' and the Reporter adds a note that this claim was worthless, 'cum toftis non sit communis pastura appendens[2]; fuit tamen communis opinio et curiae et narratoris quod licet tofti fuerat terra etc. cui communis pastura fuerat *pertinens*, non in eodem communi extra terram potuit advocare.' Here *pertinens* and *appendens* seem to be used in the same sense. In the same year a freeholder in one vill claims a common in another vill, *tanquam appendens* to his freehold, and the Reporter adds a note that in such a case the claimant 'non cepit titulum ulterius quam breve novae disseisinae limitatur, quia dixit communam esse *appendentem terrae*, et sic de ea posset uti brevi novae disseisinae, quod nisi fecerit, oporteret titulum capere de tempore a quo non exstat memoria[3].'

The cases of the years 1302–1307 as compared with those of the years 1292–4 show, I think, that the term 'common appendant' was becoming appropriated to common claimed as held with a freehold in the vill; though in some cases even that is called 'appurtenant,' and though the term 'appurtenant' is never contrasted with 'common appendant,' in them.

In 1332[4], it is definitely stated as a defence that 'la terre a que le plaintiff claim la commun destre appendant fuit de wast, et derreinment approve, a quel commun ne puit estre appendant.' But the Assize found 'que ce fuit ancient terre a que common fuit appendant de tout temps.' This follows out the passage in Bracton that common cannot *pertinere* to a place in which in its waste condition every one has had common. In the same year[5], turbary was claimed as *appendant* to land which was found to be an assart granted 'cum pertinentiis,' and Counsel for the claimant urged, 'Si vous a moy grantes un place de terre ou tant de common come *appurtenant* a une bove de terre en certlieu, la passe le commun comme *appendant*, car celui que ad la terre aura le commun;' but the opposite Counsel denies this, and his denial is upheld by the Court. Though one ground of this decision may be that in either case the common did not arise by prescription and the grant of the appurtenances passed no common at all, yet there seems here to be

[1] 33–35 Edw. I. p. 495.

[2] Mr. Horwood translates 'was not *so* appendant;' i. e. I suppose that it could be distrained on.

[3] Ibid. p. 507. The claimant of a right appendant to land by grant need only show seisin since 1220; claiming by custom a longer proof would be necessary. Finl., Reeves, i. 299, note. The distinction here again seems to be between a praedial and a personal right.

[4] Liber Assisarum, pl. 2. [5] pl. 9.

a recognition of common appendant, as the name for the common belonging to land anciently arable.

A little later, in 1337[1], William claims common of pasture in land, meadow, wood, moor and pasture, in the vill of F., '*appurtenant* a son franc tenement quil ad en la ville de C.,' for all manner of beasts. The Assize find that in the wood, moor and pasture, W. was seised of common of pasture 'comme *appendant* a son franc tenement et lui et ses auncetres avount estre seisis de temps,' etc. In another case[2] a claim of common *appendant* to land was met by an allegation that in the time of Henry III the land and the common were in one hand, and that the common had therefore been merged[3]; an attempt is also made to claim common as *appendant* to messuages, to which the objection is made that 'par lei commune ne poet estre *appendant* al mies, quare amesurement ne poet estre fait;' but the other side claim the common as *appendant* to the messuage from time immemorial, and the issue is received whether they were so seised. Here it would seem that the modern sense of common appendant as only belonging to arable land has not been reached. Later the case is put[4]: 'Si homme clayme commune de pasture com *appendant par prescripcion de temps*.' In 1338, estovers are claimed as *appendant* to a freehold, which is inaccurate in the modern use of the term[5]. But a number of freeholders claim pasture, which seems in no way to differ from common appendant, as '*appurtenant a lour frank tenements*[6].' A prior and others say they have 'terre en une ville a quei commune est *appendant*;' and their cattle have pastured in a field called Southfield 'qui chescun terce an gist warrect, a quel temps touz les communers deivent communer par tut l'an, et ount commune de tut temps cum *appurtenant*[7];' where the two words seem synonymous. In 1339, again, common in one vill (A.) is claimed 'comme *appendant* al franc tenement que nous tenoms en la ville de B., de temps dount memorie nest[8]:' a use of the term *appendant* which is certainly contrary to Coke's explanation of it; for the 'encouragement of tillage' hardly demands that one vill should have pasture in the lands of another. The result of these cases in 1337–8 does not show the distinction, if any, between the two kinds of common at all advanced in clearness, but if anything more obscure.

In 1339 the prioress of N. claimed common of pasture 'comme

[1] 11 Edw. III. p. 30.
[2] Ibid. p. 70.
[3] A similar allegation appears in 1351, 24 Edw. III. pp. 25, 45. Broke, Common, 10, 'Comment que soit common appendant.'
[4] Ibid. p. 195.
[5] Ibid. p. 495; see also Broke, Common, 6, in 1348.
[6] Ibid. p. 561.
[7] Ibid. p. 562; obviously a common field lying fallow the third year in rotation.
[8] 13 Edw. III. p. 208.

une grosse de temps dont memorie nest.' The Assize found that the prioress and her predecessors had not used the common with their beasts couchant and levant at all times in a certain place, but with their beasts couchant and levant in all parts of their farms; and the Court said that if the former alternative had been found, 'la common sera agarde per force de Ley *appendant* a cel place, et nient un grosse.' Here again the distinction seems to be made between rights of common belonging to particular land, and rights belonging to particular persons[1]. In the same year[2], in the course of a long discussion as to the rights of a commoner to take in other beasts, the only distinction suggested is between 'common appendant ou per speciality,' 'common appendant ou gros;' though Broke in 1576, abstracting the case, simply uses the distinction 'common *appendant* ou *appurtenant*[3].'

In 1352[4], on a claim to common 'quae pertinet ad liberum tenementum suum' in three acres of moor with all manner of beasts in all seasons of the year, Counsel said that pigs, goats and geese were not beasts of common, and that this common was claimed as *appendant*, which could not be understood of such manner of beasts; but the plea was not allowed. Broke suggests that 'all manner of beasts' meant 'all manner of commonable beasts,' but again it may be that the distinction was not then recognised. Anticipating for a moment, in 1428 Babbington J. laid down that if there was a grant 'pro averiis suis in D.,' 'uncore il ne poet communer mes tantum ove avers comminable;' and Broke shows that the dictum was not long-established law by adding '*Quod nota*[5].' In 1367, in a claim of 'common *appendant* a 20 acres en mesme la ville . . . et il et touz ceux que estat il ad ount eue comen en mesme le lieu de temps dount memorie nest,' Counsel say, 'Mes al entent de ley, home n'avera mie common *appendant*, s'il ne soit appendant du temps du prescription[6].'

The result is, that though the matter of Common Appendant in its modern definition appears to be taking form in the early part of the fourteenth century, there is no clear case of distinction between commons appendant and appurtenant before 1462; and even then the difference is not clearly grasped, for in 1472 we find Littleton J. saying[7], 'chescun common per cause de vicinage est common appendant;' to which Broke adds 'nemo contradixit neque affirmavit.' There are many traces of an early distinction

[1] Broke, Common, 23; 22 Lib. Ass. 36.
[2] 22 Lib. Ass. pl. 84.
[3] Broke, Common, 40.
[4] 25 Lib. Ass. 8.
[5] 9 Hen. VI. pl. 36; Broke, Grant, 5.
[6] 40 Edw. III. pl. 10; 4 Hen. VI. 13; Broke, Common, 11: see also in 1444, 22 Hen. VI. 10, 'cestui qui justify pur common appendant ne besoign de prescriber in ceo auxi.'
[7] 7 Edw. IV. 26; Broke, Common, 29.

between common belonging to land, to which the name 'common appendant' is given, and common belonging to a person, held by some special title or grant, in which *specialité* prescription is sometimes included. Common appendant is always spoken of as belonging to *liberum tenementum* and *libere tenentes*; and therefore would not be a right of the villeins or *tenentes in villenagio*, who were not *libere tenentes* though they might be freemen. But as we have seen that the *libere tenentes* in most manors in England came into existence after the Conquest, and, in the remaining manors, pass through a change of title and lordship at the Conquest, it becomes clear that common appendant cannot be treated, as Mr. Williams[1] treats it, as a relic of the village community. It seems also that the view of the Court in *Earl Dunraven* v. *Llewellyn*[2], that common appendant resulted from a grant to each individual freeholder, is, when we consider Bracton's language and the origin of *libere tenentes*, more correct historically in all probability than Mr. Williams' view that common appendant was of common right and independent of the lord's grant.

It remains to consider why the distinction between Common Appendant and Common Appurtenant should become marked at the time it did; and I think a reason can be suggested. Before the year 1285 there were in the manor freeholders holding land *cum pertinentiis*, which included a right of common varying according to the terms of the grant, but usually for a number of cattle proportionate to the amount of land and engaged in its culture[3]. There were also holders in villeinage, at the will of the lord, with certain customary rights of common which could be dealt with only in the lord's court. But in 1285 the Statute *Quia Emptores* created a change: no new freehold tenants could be so enfeoffed as to hold their lands as tenants of the manor; but all grants of freehold land by the lord would establish the grantee as a freeholder independent of the manor. This at once provides in the freehold tenants of the manor a class of tenants, which cannot be increased, and which has special rights of common. It would not be till some time after the Statute *Quia Emptores* that the class would become a marked one, by the creation of freeholders independent of the manor, and the improvement in the position of the tenants in villeinage. But when the class had become well recognised, it was natural that a special name should be given to the right of common most usually enjoyed by its members, and even that such a right should be presumed to exist in each member of

[1] Rights of Common, p. 37.

[2] 15 Q. B. 791.

[3] Thus c. 46 of the Statute of Westminster the Second (1285) implies that a freeholder 'debet habere communiam pasturae quantam pertinet ad liberum tenementum suum, *de jure communi*,' but contrasts this with '*speciale feoffamentum*.'

the class unless he proved a greater right. What determined the particular names given it is impossible to say; but, Common Appendant being appropriated to this particular class, Common Appurtenant comes to include all other rights of common, by virtue of the ownership of land, over the manorial commons, whether arising from express grant or from custom. *Common in gross* is the personal servitude, as opposed to the two common rights attached to land; and common *pur cause de vicinage* is merely an excuse, when excuse was needed, for trespassing or straying in the great wastes in which the townships or hamlets were scattered.

The legal amplification of the ways in which common can be claimed is perhaps therefore 'a creation of the Elizabethan lawyers;' but fuller investigation confirms the view expressed at the outset that the legal view of the origin of commons is quite compatible with the historical position All legal rights of common originate in the lord's grant or in his permission or sufferance, and this is the essence of the legal view. Before that grant there is, at any rate in some parts of England, a system of customary rights of common among members of a free community independent of a lord; it may even be that in many of the later manors there was, at a more or less remote period, this condition of things; and this is the historical view. But the historical fact that freemen had rights of common independent of any lord before the Conquest cannot affect the legal position of manorial rights after the Conquest or to-day; nor can the legal theories of Norman lawyers or of to-day detract from whatever truth lies in the early history of the Free Village Community.

T. E. Scrutton.

DETERMINABLE FEES.

I.

IN a notice of my book on the Rule against Perpetuities published in the second volume of the LAW QUARTERLY REVIEW, p. 394, H. W. E. discusses the effect of the Statute *Quia Emptores* on determinable[1] fees. As this is a matter of difficulty and of some theoretical importance, I may perhaps be excused in calling attention to it again.

In beginning to read law, almost the first proposition which the student meets is that fees are either absolute or determinable. As he goes on he comes across innumerable fees absolute, but he never finds a fee determinable. They have disappeared from real life for six hundred years. Why have they disappeared? Are they still possible?

The difficulty arises from the co-existence of the following two facts.

First: Since the passage of the Statute *Quia Emptores* (1290) there does not appear to have been such a thing in England as a fee determinable in a corporeal hereditament granted by a subject. It should be observed

(*a*) That the Statute did not apply to the king; and he could therefore still grant a fee determinable. To this effect are some of the cases cited by H. W. E.

(*b*) As there is no tenure of a rent, the Statute does not apply to it, and therefore there still may be a fee determinable in a rent. To this effect are the rest of the cases cited by H. W. E.

(*c*) The case 21 Ass. Pl. 18, referred to in 10 Rep. 41 b, 42 a, cited by H. W. E., seems to have been the case of a chattel interest like that created by statute merchant.

(*d*) No one of the twenty-six authorities given in the list of Mr. Preston as revised by Mr. Challis, presents a decision on a common law possibility of reverter in a conveyance by a subject. They are all instances of grants by the Crown, or of ordinary shifting uses or executory devises, or of *dicta*, often very irrelevant *dicta*. Challis, Real Prop. 201–206.

Secondly: On the other hand, it must be admitted that although determinable fees were declared illegal by Anderson C. J. in

[1] In deference to H. W. E.'s opinion, I abstain from calling these fees 'qualified.' But the special use of the term 'qualified fee' by Mr. Preston (1 Pres. Est. 449, 468) seems to have been peculiar to him and not to have been noticed by any writer except Mr. Challis. 'Qualified' has generally been used as synonymous with either 'determinable' or 'base,' from Lord Coke's time down.

Christopher Corbet's case, 2 And. 134, 138, 139, the theory that they were put an end to by the Statute *Quia Emptores* was not advanced till the present century.

That determinable fees fell out of use upon the passage of the Statute *Quia Emptores*, because it was believed the Statute had made them illegal, certainly cannot be proved. Very probably the effect of the Statute in preventing the feoffor from giving himself any possibility of reverter may have caused such fees to be disused; since the feoffor had no reason to limit the interest of his feoffee, if the feoffor's lord, and not the feoffor himself, was to profit by the limitation. Thus the question whether a possibility of reverter could be created by a feoffor for his lord's benefit may never have come up.

But the matter, I submit, at the present day presents itself in this fashion.

If, first, determinable fees have, as matter of fact, been disused since the Statute *Quia Emptores*; if, secondly, their allowance would be useless or pernicious; if, thirdly, the most probable theory of the effect of the Statute, consistent with itself and the authorities, negatives them, then they ought to be disallowed.

Now, first, determinable fees have not been used since the Statute *Quia Emptores*. Secondly, they are either subject to the rule against perpetuities, or they are not. If they are subject to the rule, they are useless, for every end to be reached by them can be reached by uses or devises. If they are not subject to the rule they are pernicious.

This leaves the question whether it is the most probable and consistent theory that the creation of determinable fees was put an end to by the Statute *Quia Emptores*.

H. W. E. agrees with me that after the Statute there could be no possibility of reverter in the feoffor. This is the point on which I myself feel the greatest difficulty. The right to enter for breach of condition survived in the feoffor, despite the Statute. I have endeavoured in my book, § 31, to establish a distinction between possibilities of reverter and rights of entry for breach of condition, and I think the distinction sound, but it is, I acknowledge, a fine one.

But H. W. E. suggests that, although after the Statute a feoffor could not create a possibility of reverter for himself, yet he could for his lord; or, in other words, that he could, by limiting his feoffment, give a reversionary interest, i.e. a possibility of reverter, to his lord, though he could not give it to himself.

I have been unable to find any direct early authority on the point, but legal analogy seems against the creation of such an interest in the lord.

1. That the judges disliked these possibilities of reverter, and did all they could to disallow them, is shown by their treatment of conditional fees, and afterwards of estates tail.

2. The judges were quite ready to recognise the fact that the Statute *Quia Emptores* might have the result of rendering certain holdings impossible. Thus land given in frankalmoign could be held only of the donor. On the passage of the Statute, had the courts been anxious to preserve the old tenures, they might have easily held that the law substituted the lord in the donor's place, but on the contrary they held that the Statute had rendered the granting of an estate in frankalmoign impossible to a subject. Litt., §§ 140, 141.

3. Before the Statute the state of things was this: (1) Land could be conveyed to be held of the feoffor's lord (2 Inst. 501), but it is not likely that any attempt was ever made to create a fee determinable to be held of the feoffor's lord, for if the feoffor should make a special limitation he would want to profit by it himself; thus conditional fees (before the Statute *De Donis*), the most common of determinable fees, always seem to have been held of the donor. See the writ of Formedon *in reverter*, which was a common law writ before the Statute *De Donis*, F. N. B. 219, and the treatment given to estates tail, especially the fact that a provision attached to an estate tail that it should be held of the donor's lord was considered void (2 Inst. 505). (2) The only future interest which could be granted to a third person was a remainder. No remainder could be created after a fee determinable. A possibility of reverter could not be alienated. These were as fundamental doctrines as any in the old law. Probably, also, contingent remainders were not allowed.

Thus before the Statute two things were familiar; one that land could be granted to be held of the feoffor's lord; the other that no future contingent interest could be given to a third person. The Statute worked no change in the first conception. It merely made compulsory that which was permitted before. It seems unlikely that it worked any change in the second.

4. It was a common thing to hold special limitations illegal and void. Witness the numerous cases where a limitation was attempted to a particular class of heirs. So also the case of an estate tail to be held of the donor's lord just mentioned. It was easier to the mental habits of a judge in those days, to strike out such special limitations as repugnant, than to accept the idea that a reversionary interest could be created in any one but the grantor of an estate.

5. If it had been thought that a possibility of reverter could be

reserved to a feoffor's lord, would not the right of entry for condition broken and the right to rent reserved have been probably also held to pass to him? Yet we know they were not.

6. H. W. E. seems to regard the possibility of reverter as in the nature of a right by escheat. Looking at it even as a right by escheat, the theory of escheat seems to be that whenever a tenant in fee alienates his estate, the alience is in exactly the same position as if the original feoffment had been made to him. No conduct of the original feoffee, no failure of his heirs, can affect the alience. It does not seem as if limitations put on by the original feoffee should do so. But, further, a possibility of reverter is not a right by escheat. It was protected at common law by a Formedon *in reverter* and not by a writ of escheat. There is said also to be no dower after the termination of a determinable fee, while escheat does not cut off dower. Park, Dow. 163.

I freely admit that all this falls far short of a demonstration, but it points one way; and nowhere have I found, either in the old or new books, anything which in the least indicates that a possibility of reverter could enure for the benefit of the feoffor's lord.

In conclusion, let me put a practical question. Suppose that a building had been conveyed by *A* to *B*, to hold to him and his heirs so long as it was used as a dwelling-house; and that, all the houses in the neighbourhood having been turned into shops, *B* turned his building into a shop also. Does any one believe that a suit by the Crown to get possession of the land would as a matter of real life be successful in the courts to-day?

I should say it could not, because (1) since the Statute *Quia Emptores* there can be no possibility of reverter; (2) if there could be, the one which it is here attempted to create is too remote. But what would be the answer of those who deny these propositions?

J. C. GRAY.

DETERMINABLE FEES.

II.

I HUMBLY conceive that the learned and ingenious arguments of Professor Gray against the validity of determinable fees might be separately answered in detail. But for the saving of time and space, I will on this occasion confine myself to a single argument, which, since he does not notice it, would appear not to have occurred to him. It is one which certainly calls for some consideration.

That a cardinal result of the Statute of *Quia Emptores* should be left to be discovered by Sanders[1] in the nineteenth century seems to me, I confess, what Chillingworth calls 'extremely improbable, and even cousin-german to impossible.' That Lord Coke, Plowden, Croke, Sir Henry Finch, Lord Nottingham, the author of the 'Touchstone,' Serjeant Maynard, Vaughan, Treby, Powell, Lord Hardwicke, Preston, Fearne, Butler, Watkins, (to put together at random the names of a few men who have believed with unquestioning faith in the existence of determinable fees since the Statute,) should have passed their lives in intimate familiarity with the Statute, without any one of them lighting or stumbling upon what, if it were true, would be a fairly obvious truth, is not a hypothesis to be accepted, unless no other rational explanation of the language of the Statute can be found.

Another and to my mind a simpler explanation presents itself. The third chapter of the Statute contains the following words:— 'And it is to wit, that this statute extendeth but only to lands holden in fee simple.' The suggestion is at least plausible, that here 'fee simple' means 'fee simple absolute.'

That is, in fact, the proper meaning of the words; according to the maxim, *Verba aequivoca et in dubio posita intelliguntur in digniori et potentiori sensu.* (Co. Litt. 73 a.) So Littleton (sect. 293), as translated by Lord Coke, says: 'And it is to be understood, that when it is said in any booke that a man is seised in fee, without more saying, it shall be intended in fee simple; for it shall not be intended by this word (in fee) that a man is seised in fee tayle, unless there be added to it this addition, fee tayle, &c.' By this '&c.' he means here, as he often does elsewhere, to extend his words to other like cases; which is as much as to say that, as fee means

[1] 'Mr. Sanders was the first author to distinctly recognise, or at any rate to distinctly state, that the Statute *Quia Emptores* put an end to qualified fees.' (Gray on Perpetuities, § 36, p. 25.)

fee simple, so fee simple means fee simple absolute. So in *Metcalfe's case*, 11 Rep. 38, at p. 39 a, it is said, 'If fee is mentioned, it shall be intended fee simple;' and this is put as one example of a class. The same idea is elaborated in *Gregory's case*, 6 Rep. 19.

The Latin, which is of course the actual original of the Statute, is still more evidently to the purpose; for the words are *in feodo simpliciter*, not *in feodo simplici*. A gift to *A* and his heirs so long as *J. S.* shall have heirs of his body, cannot with much propriety be styled *simpliciter* the gift of a fee.

It is worthy of notice that Lord Coke in 2 Inst. 504, 505, misquotes the Statute, giving the words as *in feodo simplici*. Yet, even with this assistance towards the conclusion advocated by Sanders, it is plain that no such idea ever occurred to his mind.

In vigour and acuteness of reasoning, and in what is commonly but somewhat vaguely styled 'grasp of general principles,' Sanders is, if I may express an opinion, inferior to no legal writer of this or the last century. But it is a perhaps not wholly insignificant fact, that in reading his writings I have always felt like a traveller in a strange land, where everything wears an odd and unexpected appearance. Fearne, Butler, Watkins, Preston, sometimes differ and even dispute; but they all talk the same language, and one feels equally at home with all of them: even with the subtle and dogmatic Watkins, some of whose perquisitions and conclusions are quite as bold as anything that is to be found in Sanders. But the paradoxes of Watkins have about them a sort of capacity for soon looking like familiar propositions, while in the mouth of Sanders the most obvious truth acquires some new and startling aspect. This shows the originality of his intellect, but it does not prove him to be the safest of guides. He should be followed with caution in cases where he happens to differ from the whole civilised world before him.

Against the remarks of Professor Gray upon nomenclature, I have not much to object. It is quite true, as he observes, that Preston was the first to restrict the phrase 'qualified fee' to denote a fee limited to a particular class of the heirs general. It may also, for aught I know to the contrary, be the fact that I am the only writer who has followed him in this respect. But with the exception of Preston I know of no writer since Lord Coke, who has betrayed by any symptom that he was aware of the existence of this kind of fee. Men can easily dispense with particular phrases to denote particular things, when they are not aware that such things exist.

Whether Littleton was right in holding that this kind of fee can be limited at the common law, may possibly be thought to be an

open question. But there can be no question that, in England, such a fee can now be limited under the provisions of the Descent Act, 3 & 4 Will. IV, c. 106, s. 4. So very peculiar a limitation seems to require a distinctive name; and perhaps the use of the name may assist in spreading the knowledge of the thing. When the case of *Blake* v. *Hynes* came before the House of Lords in 1884, it was evident that not any of the lords present, though including Lord Blackburn, or of the counsel for the appellant, though including Sir Horace Davey, had imagined the possibility of such a limitation. If Lord Coke, when he commented upon Litt. sect. 354, had invented a special name to denote the kind of limitation there described, those learned persons would have had much reason to feel very grateful.

Professor Gray may be quite right in thinking that Lord Coke, in his division of fees, used the word 'qualified' as a mere synonym for 'base.' I have always been very curious to know whether this was Lord Coke's meaning, and have never been able to satisfy myself. His language on this point to me seems even to show signs of a studied ambiguity. But when he uses the words separately, his usage, so far as I have observed it, conforms to the ordinary meaning of the words 'base fee;' and this has always made it appear to me doubtful, whether in his division of fees he intended 'base' to be synonymous with 'qualified.'

H. W. Challis.

THE DIVISION OF PROPERTY INTO REAL AND PERSONAL ESTATE.

WITHIN four years three Bills[1] have been brought into Parliament, intended to assimilate, more or less closely, the law of personal to that of real estate. But by none of them was the distinction between these two classes of property to be effaced.

Of such effacement I wish here to show the necessity. The property of a deceased owner should, I say, form an undivided fund, administered by one law. No one would propose that this one law should be that of real estate: it must be that of personal estate, with or without amendments.

Real estate differs from personal estate mainly in that (1) it is not placed under the control of the executor or administrator; and, (2) in case of intestacy, does not pass by the same rules[2]. From each of these differences as the cause, many evils will be here shown to follow.

Two papers were published last year, one by the Council of the Law Society and the other by the Bar Committee, which, as a means of facilitating the transfer of land, and guarding against the complexity of titles likely to be caused by fractional interests when primogeniture is abolished, favour the constitution of a real representative, whose title would be officially shown by his probate or grant, and on whom real estate would devolve, as personal estate now devolves on the personal representative[3]. Whatever advantages might be thus obtained would seem to be equally secured by vesting the real estate in the executor or administrator; while the expense of constituting a separate real representative

[1] A Bill for the Amendment of the Law relating to the Administration and Devolution of the Estates of Deceased Persons (Mr. Davey, Mr. Hastings, and Mr. Mellor, 1884); a Bill to amend the Settled Land Act 1882, and for the Simplification of Titles (Mr. Ince, Mr. Courtney, and Mr. Stanhope Kenny, 1886); and a Bill intituled An Act to further simplify Titles and facilitate the Transfer of Land in England (the Lord Chancellor, 1887).

[2] Real estate also differs from personal in that it can be the subject of an estate tail. But I need hardly fear the argument that the distinction between the two classes of property, if shown to be otherwise mischievous, should be retained in order to secure the *benefits* (!) of estates tail.

[3] Statement on the Land Laws by the Council of the Incorporated Law Society of the United Kingdom, Butterworths, 1886, p. 55. Land Transfer, published by Order of the Bar Committee, Butterworths, 1886, p. 54.

would be saved. Accordingly all three Bills have proposed that this should be done.

Fractional interests are undoubtedly a serious evil. Mr. Joshua Williams, writing in 1861, says that 'the division of property into small shares held in common is one of the most fruitful sources of that expense and delay in sales which are now so much complained of[1].' Improvements, too, are prevented, and other useful dealings with land, while it remains unsold. I do not think that the mere constitution of a real representative, or vesting of real estate in the personal representative, would do all that, without primogeniture, will be needed to guard against these results.

Besides the two main differences between real and personal estate, there is another difference which, on this point, needs notice. It is that an heir or a residuary devisee is entitled specifically to the real estate left by his ancestor or testator, whereas a next-of-kin or a residuary legatee is entitled merely to the general balance of the personal estate on a winding up, without claim to specific portions. If the effect of any Act passed for abolishing primogeniture should be that residuary devisees (still) and next-of-kin (for the first time) take the real estate specifically in undivided shares, though subject to the assent of a representative, it is certain that, the assent being in any instance given, there will be established the precise state of things which Mr. Williams deemed such a fruitful source of expense and delay in sales, and which the Council of the Law Society say would immensely add to the complexity of titles. And that this state of things would, when such an Act had had time to produce its natural results, direct and indirect, exist in many more cases than at present, is sufficiently evident; especially when it is remembered that, primogeniture ceasing, intestacy will almost certainly be more common. It seems to me, therefore, that it is not enough to remove the two main differences between real and personal estate, but that the classification should itself be abolished, and that next-of-kin and residuary legatees should have, in the whole property of a deceased owner, precisely that kind of interest, and that only, which they now have in the personal estate.

None of the three Bills propose this. The Lord Chancellor and Mr. Ince could not. By their schemes, the husband or wife of an intestate owner takes a life interest in the whole or a moiety of the real estate, or of the residue of the real estate after all legal claims are satisfied. The beneficial interests in the real and personal estate not corresponding, the continued separation of the two classes of property is necessary. Sir H. Davey's Bill, also,

[1] Williams on Real Assets, p. 130.

assumes that there will still be such a thing as a 'residuary devise;' and, under it, residuary devisees would still be tenants in common[1].

The probable reintroduction of the Lord Chancellor's Bill is what, at the moment, gives importance to the subject of this article. His main object was to establish compulsory registration of title. With that I am not here concerned. But, as a subordinate object, he proposed to simplify and improve the law of real estate by partially assimilating it to that of personal estate. To judge of the merits of such a Bill, it is necessary to inquire what are the evils produced by the present division of property. For, in so far as the Bill remedies these, it attains the object of the complete assimilation here recommended. Moreover, independently of the Bill, the same inquiry is necessary for the purpose of establishing my proposition that the property of a deceased owner should be administered by the law of personal estate. Any exhaustive enumeration of the evils would be impossible. But, under a few of the chief heads of law, I will give examples.

Administration of Estates.—Lord Romilly's Act (3 & 4 Will. IV, c. 104) has made the real estate of a deceased debtor 'assets to be administered in courts of equity for the payment of the just debts . . . . . as well debts due on simple contract as on specialty.'

Were the whole property vested in the executor or administrator, a creditor, suing him in the Q. B. D., could have a simple remedy where there were available assets of any kind. There, a case is made out by proof of the debt of the creditor suing, and of the fact that there are assets unadministered in the hands of the defendant. But when the real estate is sought to be charged in an action for administration, the general personal estate, being liable primarily, must be shown to have been exhausted in the payment of other claims. This involves inquiry as to what the whole personal estate consisted of, and what other debts and liabilities there were. For such inquiries, the Chancery Division has machinery specially adapted; and it is here accordingly that a remedy is given to the creditor. His grievance, then, is that he has no prompt remedy against the whole estate of the deceased debtor; but that his more simple remedy affects the personal estate only; while, to touch

[1] I do not wish to deprive testators of the power of giving land specifically to tenants in common, but I think that 7 Will. IV & 1 Vict. c. 26, s. 25, by which lapsed and void devises fall into the residuary devise, should be repealed; and that a residuary bequest of 'property' should have the same effect as regards the whole property as a residuary bequest of personalty now has with respect to the personalty; and that the terms 'devise,' 'residuary devise,' and 'real and personal estate,' should ultimately cease to be terms of art in English Law.

the real estate, he must use a second and often a cumbrous one[1].

Then unliquidated damages for a wrong are not within Lord Romilly's Act; and the real estate escapes even in that limited class of cases where, by 3 & 4 Will. IV, c. 42, s. 2, an action for a wrong committed by the deceased will lie against his executor or administrator. Nor, were this altered, is an action for administration a convenient remedy for disputed claims of damages of which there is no precise measure.

The beneficiaries in the personal estate, as well as the creditors, have grievances. One is that (where sufficient) it bears the whole of the debts and funeral and testamentary expenses. While property is classified as it is now, I do not see how this can well be otherwise. For the inconvenience would be extreme of a rule that these burdens should be borne rateably by the real estate and the residuary personal estate; involving, as it would do, the further rule that, where the real estate was distributed among several devisees, the proportion borne by the whole of the real estate should fall rateably on the different parts. For a general inquiry would be necessary, in each case, as to what debts there were, what property there was, and the value of the different parts of that property. Rather better, and only rather better, would be a rule that the burdens in question should be borne rateably by the *residuary* real estate and the residuary personal estate[2]. Thus serious injustice and hardship are inflicted in order to avoid still more serious inconvenience. That injustice *is* inflicted is plain. For what candid person would say that the debts ought to be thrown on land held for a term of years rather than on land held in fee simple, or on persons to whom one portion of the property goes by law or by residuary gift, as the case may be, rather than on persons to whom another portion goes in precisely the same manner?

Another grievance of the beneficiaries is that, by a rule which, in the present state of the law, has conveniences of the same kind as the rule just discussed, but which will vanish with the distinction on which it rests, the costs of an administration action are, under ordinary circumstances, borne by the general personal estate. In

[1] Further, it seems that a judgment against the executor in an action by a creditor would not estop the heir or devisee from disputing the debt. *Harvey* v. *Wilde*, L. R. 14 Eq. 438.

[2] Yet this was apparently the Lord Chancellor's proposal. Were the debts ever so small, scraps of real estate must be sold to pay fractions of debts. See s. 42, subs. 1 of the Bill as ordered by the House of Commons to be printed, 15 July, 1887. I say 'apparently,' for the section is not the clearest possible. But s. 39 prevents the *fusion* of real and personal estate; and subs. 4 of s. 42, which authorises the personal representative, 'for the purpose of administration,' to value the real estate, seems to show that the sums payable out of the real estate, in respect of debts and costs of administration, are to be ascertained by the method of apportionment.

such an action heavy expenses may be incurred in investigating and reducing or successfully resisting claims, to the ultimate relief of the real estate; while the personal estate is exhausted in the process. This, too, may easily occur, and probably occurs still more often, where there is no such action.

Vendor and Purchaser.—A purchaser of real estate, by force of the contract, becomes owner in equity of such real estate; while the vendor becomes owner in equity of personal estate of corresponding value. If either party die pending completion, the real or personal estate so acquired by him passes according to its character. Should the contract be rescinded during the lives of both, they are restored to their old position; and if either afterwards die intestate, the course of devolution is of necessity reversed.

This is not well. The disposition of a man's property should not, where such a consequence can be reasonably avoided, be thus altered by that which he does in the ordinary course of business, and to meet the practical exigencies of life;—which would seldom be accompanied by changes in the circumstances and necessities of his family, rendering such an alteration desirable;—and which would not usually have reference, in his own mind, to the disposition of his property at death.

That it should be so altered is unreasonable enough; but there are cases in which, assuming the law to be rightly stated in the following passage, still more curious results occur. 'If, during the vendor's lifetime, he himself abandon the contract, or if, through want of title or for any other reason, the contract, at the time of his death, be capable of being enforced only *against* and not *by* him, the right of the personal representatives would seem to depend upon whether the purchaser do or do not choose to enforce specific performance[1].' In other words, the purchaser, in such a case, makes a will for an intestate vendor. But is it right that the disposition of one man's property should depend on whether another man, for purposes of his own, do or do not enforce specific performance of a contract?

In a recent case it was ascertained, after a vendor's death, that a sufficient title could not be made to part of the property sold; and accordingly the trustees of his will were obliged to rescind the contract and resell the rest. The ultimate residue of the proceeds of his real and personal estate not being disposed of by the will, the purchase money, or a balance of it, which fell into that residue, resulted to the heir; and the widow and next-of-kin, whom the testator must have had reason to regard as his successors, were

[1] Dart's V. & P., 5th ed., vol. i. p. 262. See also 1 Jarm. on Wills, 4th ed., pp. 55–6.

disappointed [1]. Had the purchaser been willing to complete, this result would have been avoided. Thus the money was at the disposition of the purchaser, whose power in this respect was due to the fact that real and personal estate do not pass by the same rules.

Where a lessee of real estate, with an option of purchasing the fee, exercises his option after the death of the lessor, the purchase money is held to be personal estate of the lessor [2]. Here, again, is the same absurdity. In a reported case [3], a lessee's option to buy was exercised sixteen years after the lessor's death. Had the lessor died intestate, the disposition of his property would have been altered by the lessee sixteen years after his death [4].

A will, too, may be made by a vendor for a deceased purchaser. Where a defect in a title was remedied after the purchaser's death, the purchase money was held payable out of the *personal* estate [5]. Had the vendor not made the defect good, the purchase money would have continued to form part of that personal estate. The case of a purchaser alone signing a contract of sale, enforced, or not enforced, against his representatives by the vendor, would probably be held to stand on the same footing [6].

Where the vendor has a lien for his unpaid purchase money, he would not now have this power; because, by 30 & 31 Vict. c. 69, and 40 & 41 Vict. c. 34, the purchased property is, in that case, primarily liable. But the lien may be excluded by the nature of the contract, or otherwise extinguished [7], when those Acts would not apply to the case, and the old rule would hold good [8].

So far, I have been considering the case of the beneficiaries in the estate of a deceased vendor or purchaser. But the interests of creditors and claimants for damages must be taken into account. A vendor or purchaser of real estate, by signing the contract, decides that his creditor shall, as against a portion of his estate, have a remedy in the Q. B. D., or be remitted to an administration action. He may likewise decide whether a person who has suffered wrongs at his hands shall, as against the same portion, have any claim at all. And where, at the time of the death of a vendor, the contract can only be enforced by the purchaser; where a lessor dies whose lessee has an option to purchase; and where a purchaser dies before the vendor's title is made good:—in all these

[1] *In re Thomas*, 34 Ch. D. 166.
[2] *Lawes* v. *Bennett*, 1 Cox 167; *Townley* v. *Bedwell*, 14 Ves. 590.
[3] *In re Adams and the Kensington Vestry*, 24 Ch. D. 199.
[4] 'The retrospective conversion of a person into a trustee of property is a result eminently inconvenient.' Per Fry J. in *Edwards* v. *West*, 7 Ch. D. 858 (at p. 862). This is precisely what here occurs to the heir of the lessor.
[5] *Garnett* v. *Acton*, 28 Beav. 333.
[6] 1 Jarm. on Wills, 4th ed., p. 56.
[7] *In re Brentwood Brick and Coal Co.*, 4 Ch. D. 562.
[8] *In re Cockcroft*, 24 Ch. D. 94 (at p. 100).

cases the same questions may be decided by a stranger, guided by no consideration but that of his own interest.

Mortgagor and Mortgagee.—A great deal of what has been said under the last head would find place here also with little variation. Thus, where a mortgagee of real estate, with power of sale, contracts to sell the mortgaged property, the mortgagor's rights are as much changed as if he had been himself the vendor. For he is now owner of personal estate, which, on his death, passes as such. Should the contract be rescinded during his life, he is again owner of real estate, which will pass accordingly. What I have said as to the undesirableness of allowing acts done in the ordinary course of business to change the disposition of property, applies with increased force here, where the acts are not done by the man whose property is affected, and where he may not know at once that they have been done, and that the occasion for guarding against their effects by will has arisen.

Again, if the mortgagor should die before completion, in a case where the purchaser only can enforce the contract, all would turn probably on whether he does so. Here, once more, a man's property is, after his death, disposed of by a stranger.

Sometimes a mortgage includes both real and personal estate, as where there are freeholds and leaseholds; or where a mine, manufactory, or hotel has unfixed plant, machinery, or furniture, which conveniently accompanies the freehold. In this case, should a sale be made by the mortgagee after the death of the mortgagor, the surplus proceeds of each will pass according to its character. It has been several times decided that the respective properties comprised in such a mortgage must bear the debt rateably, where no contrary intention appears from the mortgage itself or from the will of the mortgagor [1].

Therefore, if, after the death of the mortgagor intestate, the mortgagee sell real and personal estate together, or either alone; or if the parties claiming under the mortgagor redeem:—in any of these cases it becomes necessary, for purposes of apportionment or contribution, to ascertain the value of each. This necessity, not unlikely to involve dispute, expense, and even litigation, is a pure result of the classification of property.

So much for the case of the mortgagor. Now as to that of the mortgagee.

On foreclosure, the mortgaged real estate becomes the property of the mortgagee; and the debt, which had before been personal estate of his, is extinguished. But the Court may, in its discretion,

[1] *Lipscombe* v. *Lipscombe*, L. R. 7 Eq. 501; *Trestrail* v. *Mason*, 7 Ch. D. 655; *Leonino* v. *Leonino*, 10 Ch. D. 460.

open the foreclosure; and this has been done after a lapse of sixteen years[1]. The discretion is practically absolute; and that it may be exercised somewhat liberally will become apparent to any one who reads the judgment of Sir G. Jessel in *Campbell* v. *Holyland*[2].

Assume, then, that a mortgagee, having obtained a final order of foreclosure, dies intestate; and that the foreclosure is afterwards opened. Who now succeeds him in interest? There appears to be no decision on the point; but two text-writers say that, where the foreclosure is opened for fraud, collusion, or irregularity of process, it is the personal representative that succeeds[3]. Here, then, the mortgagor, by opening the foreclosure, varies the disposition of his mortgagee's property, and causes a gyration of interest from the heir-at-law to the next-of-kin.

The same two writers think that, where the foreclosure is opened on other grounds, the heir retains the benefit of the mortgage; and, for this opinion, one of them gives a reason. He says that the heir is entitled to the mortgage, 'inasmuch as the mortgagee has done all in his power to make it real estate[4].' But the question is, how the money is to go in case of *intestacy?* This cannot depend on what the deceased has tried to do; in other words, on what intention he has shown. Subject to exceptions not material here, a man's intentions as to how his property shall pass after death can be ascertained only from a will executed in accordance with 7 Will. IV & 1 Vict. c. 26, s. 9. But the hypothesis is that there is no will, and that his intentions are not thus ascertainable. I therefore cannot see how the cases of fraud and no fraud are distinguishable; and it appears to me that, if the personal representative be entitled to the mortgage debt in the former case, he must be entitled to it in the latter also. It would follow that, in all cases where the foreclosure is opened after the death of an intestate mortgagee, the disposition of his property is altered for him by the mortgagor.

As further showing the confusion introduced into this head of law by the distinction between real and personal estate, I would put the case of a mortgagee dying after final order of foreclosure, of his heir entering into receipt of rents, of foreclosure opened for fraud or other cause held to let in the personal representative, and of the heir being unable to refund the rents received by him. Is the mortgagor, by not being allowed credit in account for the rents,

[1] *Burgh* v. *Langton*, 15 Vin. Abr. 476, pl. 2.
[2] 7 Ch. D. 166.
[3] Fisher on Mortgage, 4th ed., p. 329; Coote on Mortgage, 5th ed., p. 1122.
[4] Coote on Mortgage, 5th ed., p. 1122. The testator in *In re Thomas* (see ante, p. 411) did all he could to make his real estate personal, but without success.

to bear this loss? Or are the next-of-kin of the mortgagee, by the personal representative being compelled to allow the rents in account, to have the loss thrown on them? In either case, here is a loss to somebody, directly attributable to the distinction in question.

Next vary the case last put by supposing that, on the death of the mortgagee, the heir sells; and that the foreclosure is opened against the purchaser[1]. If now the heir cannot refund the purchase money, who is to bear the loss? Is it to be thrown on the personal estate of the mortgagee, on the purchaser, or on the mortgagor? In any case, here is a loss attributable to the same distinction.

Here, again, as under the last head, I must point out that that distinction affects everywhere, not only the beneficiaries in the estate of a deceased, but also creditors and claimants for damages.

Landlord and Tenant.—Before the Apportionment Act, 1870 (33 & 34 Vict. c. 35), if a landlord, owner in fee simple, died during the currency of a half-year or quarter, the next payment of rent went entire to the person then entitled to the land. Therefore if the landlord died intestate, his heir received the whole. The hardship of this, in many cases, on the family, and sometimes on the creditors of a landowner, especially where he had spent his income before its actual receipt, hardly needs pointing out. But, by s. 2 of that Act, rents and similar periodical payments are, like interest on money lent, to be considered as accruing from day to day, and to be apportionable in respect of time accordingly. The result is that the administrator, in the case supposed, now receives a proportionate part. Probably this Act would be held not to apply to a mere royalty calculated on quantity[2]. If so, royalty paid in respect of workings in the lifetime of the deceased owner, which, had he lived till the day fixed for payment, would have augmented his personal estate, will go to enrich the heir. In this case, then, is an injustice directly due to the law which separates the real and personal estate on the death of the owner.

When a lease reserves one rent out of land and personal chattels, the rent is held to issue out of the land only[3]. It seems to follow that where the landlord, owner in fee simple, dies intestate, his heir will be entitled to the rent during the rest of the term, the personal estate receiving nothing in respect of the chattels. This

[1] This may be done. See *Campbell* v. *Holyland*, 7 Ch. D. 166.
[2] See *St. Aubyn* v. *St. Aubyn*, 1 Dr. & Sm. 613.
[3] *Farewell* v. *Dickinson*, 6 B. & C. 251. See also *Spencer's case*, 1 Smith's L. C., 9th ed. (at p. 68).

injustice would be avoided by consolidating the two classes of property.

Partnership.—Lindley L. J. thus states the result of a great deal of litigation upon the question whether real estate belonging to a partnership is to be deemed in equity personal estate:—'From the principle that the share of a partner is nothing more than his proportion of the partnership assets after they have been turned into money and applied in liquidation of the partnership debts, it necessarily follows that, in equity, a share in a partnership, whether its property consists of land or not, must, as between the real and personal representatives of a deceased partner, be deemed to be personal and not real estate, unless indeed such conversion is inconsistent with the agreement between the parties. And although the decisions upon this point are conflicting, the authorities which are in favour of the above conclusion certainly preponderate over the others[1].'

Steward v. *Blakeway*[2], held to come within the exception to the rule, shows how difficult it may be to say whether a case comes within the one or the other. Moreover, as it is often a nice question whether a partnership exist at all, and as, until this be ascertained, it is impossible to say whether the rule can, on any view, apply to the case, it will be seen how fruitful a source of doubt and dispute the division of property may become where partnership land is in question.

Where a partnership has been dissolved by death or otherwise, and the shares of the deceased or outgoing partners have been paid out by a surviving or continuing partner, in whom alone all the assets of the firm are now vested, and who carries on the business by himself, the real estate, no longer impressed with a trust for conversion, will pass as such on his death. The rule is the same where a man, never in partnership, uses in business real estate of his own. But is it reasonable that one law should govern the descent of land thus used by one man, and that another law should govern the descent of land so used by two men? And ought the rights of creditors and claimants for damages to vary in the two cases?

Having now specified some of the mischiefs arising from this classification of property, the next step is to ascertain which of them are due to each of the two causes mentioned at the outset.

The way to ascertain which are due to either cause is to see

[1] Lindley on the Law of Partnership and Companies, 4th ed., vol. i. p. 667.
[2] L. R. 4 Ch. 603.

which might be remedied by withdrawing that cause, leaving the other in play.

Let us then first suppose that the real estate is placed under the control of the executor or administrator in the same manner as leaseholds are now; while, subject to this, it passes to the heir or devisee, as leaseholds do to legatees or next-of-kin.

The creditor could then be enabled, by action in the Q. B. D., to obtain payment from all available assets, real or personal. A judgment against an executor or administrator in an action for a wrong committed by the deceased could be made enforceable against his whole estate. The rights and remedies of creditors and persons entitled to damages for wrongs would not be varied by such acts as a sale, or the rescission of a contract for sale, by an owner of land or his mortgagee; a purchase; the enforcement or abandonment of a contract for sale by a purchaser after the death of his vendor, or of that vendor's mortgagor; the exercise of an option to purchase by a lessee after his lessor's death; the making good of a vendor's title after the purchaser's death; or the opening of a foreclosure by a mortgagor after his mortgagee's death. Nor would the rights of such creditors and persons be affected by the question whether their debtor was entitled to rent or royalty, or had leased personal chattels with or without land; or whether he carried on business alone or in partnership.

The evils thus remedied, or made easily capable of remedy, are due to the first of the two causes.

Next let us suppose that, on an intestacy, real estate is made to pass by the same rules as personal estate, but is not placed under the control of the executor or administrator.

One cause of administration actions would be removed, because the elaborate inquiry into the administration of the personal estate, by which only the liability of the real estate to debts can, in many cases, be proved, would commonly be without object where the interests in the two estates were the same. The payment out of the personal estate of the debts and funeral and testamentary expenses, the costs of administration suits, and the expenses of investigating claims, would no longer produce hardship to the beneficiaries in cases of intestacy, the same persons being entitled to the whole property of the deceased. The descent of property would not be changed by acts of the owner done in the mere course of business without reference to such a consequence, or by similar acts on the part of strangers, whether in his lifetime or after his death: of all which acts, I need not here repeat the examples. Many conflicts of interest would be avoided, which now lead to dispute and litigation, and sometimes to obvious injustice, in cases

where both real and personal estate are comprised in one mortgage or lease. So likewise would losses to innocent persons be prevented, which may now be caused by opening of foreclosures; and injury to the families of landlords (always excluding the heir), now caused by the non-apportionment of royalties. A cause of difficulty in ascertaining the right to partnership land would be removed; and unreasonable differences in the descent of land used in business by an individual and by a partnership would be avoided.

The mischiefs thus remedied are due to the second of the two causes.

Any one who reads the Lord Chancellor's Bill with the above remarks in his mind will see how far it is from curing the mischiefs pointed out as due to either of the causes mentioned.

Thus, although it vests the real estate in the executor or administrator, this is so managed that the creditor probably cannot, by action in the Q. B. D., obtain payment of his debt from the real estate[1]; which real estate, further, still escapes liability for wrongs committed by the deceased[1]. The rights and remedies of creditors and wronged persons are, then, still liable to undesigned variation by the acts of owners of land, mortgagees, mortgagors, purchasers, and lessees; and still depend on such questions as whether a debtor was entitled to rent or royalty, or leased personal chattels with or without land, or whether he traded alone or in partnership.

The Bill does a great deal, but not enough, to remove the evils arising from the fact that, in case of intestacy, real estate does not pass by the same rules as personal estate. Where there is no husband or wife, the two classes of property are put on the same footing as regards the beneficial interests. And in many cases the difference in value between the life interest in real estate, given by the Bill to a wife, and her distributive share in the same property treated as personal estate, would be so slight that there would be every inducement to the parties to agree not inconveniently to insist on strict rights; and where all are sui juris, many things can, with a little trouble, be adjusted by them for themselves. But where the wife is old, and a life estate would be worth little; or is young, and a life estate would be worth much; and where all

[1] This may be disputed, but I think it is a fair inference from s. 42, subs. 1. The real estate itself is to be subject to 'debts' and other payments 'in due course of administration;' the 'liabilities' spoken of earlier in the subsection are liabilities incurred by the personal representatives 'in respect of' the real estate, not liabilities incurred by the deceased in his lifetime.

parties are not sui juris; many of the existing evils will remain in a qualified form. Also some new ones are introduced, such as the multiplication of fractional interests[1], and the inconvenient rule that the debts are to be borne rateably by the residuary real and personal estate[2].

But it is not worth while to discuss with elaboration a Bill so likely to appear next time in an altered shape: it is enough to point out considerations affecting any Bill brought in with a like object.

M. H. Box.

[1] See ante, p. 407.

[2] See ante, p. 409, note 2.

DEFINITION OF FRAUD[1].

IT may be thought, and not without ground, to be both rash and dangerous to offer a definition of the term 'fraud.' Fraud is manifested in such endless variety of form and phase, in such manifold and ever-changing disguises and colours, that a definition might at first, indeed, appear hopeless. Judges have declined to attempt one, sometimes on the ground of its hopelessness, sometimes of supposed danger[2]. Perhaps a more potent reason may not infrequently have been want of time for sufficient examination of the term, in the midst of questions pressing for immediate answer; certain it is that definitions have been given. Writers on the Roman law did not hesitate to offer them[3]; the dictionaries do not pass over the term in silence; not even judges[4] and text-writers[5] of our own law have been above making the attempt.

It will not be necessary to quote all the definitions, or descriptions —for some are more properly descriptive; enough that they indicate that it is not useless or dangerous to endeavour to state in something like exact language the meaning of the term in question. Indeed, it is clear that some definite meaning must be observed, in the mind at least, in order to any consistent adjudication touching the subject; and if this is so, there is no reason why that meaning should not be stated in terms. Definition is not rule, but the means of laying down a rule; a great variety of rules may often be deduced from or applied to a single definition. To lay down a hard and fast rule of law, limiting all frauds by it, would be dangerous in the extreme; but to start with some clear and exact idea of fraud is absolutely necessary to the declaration of any rule required, not to dwell upon the need of a basis for classification of the parts of the subject.

Justified thus in proceeding to definition, we may, by way of a first step, say on good authority that the characteristic factor in fraud civiliter (the subject of this article) is either deception, touching

[1] This article will appear as Chapter I in a work by the writer, on Fraud.

[2] *Mortlock* v. *Buller*, 10 Ves. 306; *Lawley* v. *Hooper*, 3 Atk. 279. Lord Hardwicke in a letter to Lord Kaimes, as quoted by Mr. Justice Story, once said: 'As to relief against frauds, no invariable rules can be established. Fraud is infinite; and were a Court of Equity once to lay down rules how far they would go, and no further, in extending their relief against it, or to define strictly the species or evidence of it, the jurisdiction would be cramped and perpetually eluded by new schemes, which the fertility of man's invention would contrive.' 1 Story, Equity, § 186, note.

[3] *Infra*, Dig. 4, 3, 1, 2; id. 2, 14, 7, 9.

[4] *Chesterfield* v. *Janssen*, 2 Ves. 155; *Le Neve* v. *Le Neve*, 3 Atk. 654; S.C., 1 Ves. 64.

[5] Jeremy, Equity, book 3, part 2, p. 358; 1 Story, Equity, § 187.

motives, or it is circumvention, not touching motives [1]. 1. In the first form of the factor the plaintiff and defendant were concerned together in some transaction; in the second they were not. 2. In either form the factor may affect general or particular rights, i. e. rights *in rem* or rights *in personam*. 3. In defining fraud the question of its success may be disregarded; for though as a rule the Courts refuse to take cognizance of fraud which comes to nothing, still it is plain that everything which goes to constitute it is present as much in fraud which is abortive as in fraud which is successful.

Accordingly, understanding deception and circumvention as above limited, fraud may be said to consist, on the one hand, (1) in one man's endeavouring by deception to alter another man's general rights; or (2) in one man's endeavouring by circumvention to alter the general rights of another;—or, on the other hand, (3) in one man's endeavouring by deception to alter another man's particular rights, or (4) in one man's endeavouring by circumvention to alter the particular rights of another. And this may be compressed into the following:—Fraud consists in endeavour to alter rights, by deception touching motives, or by circumvention not touching motives.

The four classes may be put in the concrete thus:—

1. The owner of a horse seeks to sell it to me on the representation that it was foaled by 'Flora Temple,' which representation he knows to be false, or does not know to be true or false. He is endeavouring by deception (practised on my motives) to alter one of my general rights, the right to my money. A man to whom I am about to sell property on credit intends not to pay me for it. His conduct is of the same nature; for I have a right to suppose that his promise to pay means what it purports [3].

2. Again, if I am arrested on Sunday upon a trumped-up charge of crime, and held until Monday, all for the purpose of arresting me on Monday on civil process, the officer, or the person who procured him to act, or both, have sought by circumvention (not practised on my motives) to alter one of my general rights, my right to liberty.

[1] Ulpian tells us that Servius defined fraud, 'dolus malus,' to be 'Machinationem quandam alterius *decipiendi* causa, cum aliud simulatur et aliud agitur.' But Labeo, he says, considered this defective, and thus defined the term: 'Dolum malum esse omnem calliditatem, fallaciam, machinationem, ad *circumveniendum*, fallendum, *decipiendum* alterum adhibitam.' And Ulpian adds, 'Labeonis definitio vera est.' Dig. 4, 3, 1, 2. (In the same passage we are told why 'malus' is added to 'dolus.') Deception or circumvention, it will be seen, is the characteristic factor; and the two together are broad enough to cover the whole ground.

[2] The qualifying words in regard to motives are necessary to make deception and circumvention exclusive of each other.

[3] Some of the American courts, against the weight of authority, refuse to take cognizance of such cases, where the conduct of the purchaser stops short of any *act* of deception aside from the promise. *Smith* v. *Smith*, 21 Penn. St. 367; *Backentoss* v. *Speicher*, 31 Penn. St. 324. *Contra*, *Kline* v. *Baker*, 99 Mass. 253; *Donaldson* v. *Farwell*, 93 U. S. 631, and cases cited; *Bristol* v. *Wilsmore*, 1 Barn. & C. 514. The distinction is also unfounded in principle.

If on pretence of searching for stolen goods, but in reality to find goods to attach, an officer should wrongfully open a trunk, his conduct would fall within the same category [1].

3. The maker of a promissory note payable to me, signed by him and by another as surety, seeks to induce me to substitute for it a new written agreement, signed apparently by the same surety, upon a false representation of the genuineness of the surety's signature. He is endeavouring by deception to alter one of my particular rights, the right to the benefit unimpaired of the obligation he was (and still is, together with the surety) under to me [2]. The obligor in a bond payable to me seeks to induce me to cancel it upon a representation by him that it has been paid, knowing the contrary; this is a fraud of the same nature.

4. Once more, if in the case of a sale on credit the buyer, though intending at the time to pay me, should afterwards change his mind, and put his property out of his hands to prevent me from obtaining payment, his conduct would be that of one endeavouring by circumvention to alter a particular right of mine, the right to payment for the property sold. And any one joining him in his wrongful purpose would be guilty of conduct of the same kind. If *A* collude with my partner, in a transaction within the purview of the partnership, to gain a false credit against me, *A*'s conduct too is fraudulent in the same way; he is endeavouring to circumvent me in my rights under the partnership obligation [3].

Fraud in the sense of the definition is fraud in the only legitimate sense of the term, in its civil aspect at least; and all forms of real fraud are, it is apprehended, actually or virtually covered by the definition. There are several terms of the law however that deserve an explanation. One of those is 'fraud upon the law.' Of this it is to be said, that the term does not designate any independent kind of offence not embraced within the definition; it is a term of convenience merely, by which a striking aspect of certain frauds is designated. Every fraud must be committed against a being capable of rights; the frauds 'upon the law' are, like the rest, frauds upon an individual, upon a corporation, or upon the Sovereign; generally in evasion of some statute, such as the Bankrupt Acts, where the offence is nothing but fraud upon creditors [4], or the (American) Liquor Laws, where the offence is a fraud on the Sovereign. And much the same may be said of the old but now nearly obsolete term 'deceptio curiae;' indeed that commonly meant simple deceit [5].

[1] *Pomroy* v. *Parmlee*, 9 Iowa, 140.
[2] *Kincaid* v. *Yates*, 63 Mo. 45.
[3] Two or more of the four classes may also unite in a fifth.
[4] See e.g. *Rogers* v. *Palmer*, 102 U.S. 263.
[5] See L.C. Torts, 17.

'Constructive' fraud is a term which has been variously and loosely used. In Story's pages it often loses all colour, and becomes on the one hand merely a convenient *nomen collectivum* for a variety of contracts obnoxious to public policy, or on the other only a synonym for actual fraud. The term with Story includes marriage brokage contracts [1], contracts and conditions in restraint of marriage [2], contracts in restraint of trade [3], wager contracts [4], contracts for the buying of public office [5], and usurious contracts [6]; next cases arising under fiduciary relations, and then cases of fraud on creditors and purchasers under the statutes of Elizabeth [7], and other cases of actual fraud [8]. In a word, the term is made to include all 'acts or contracts' having a 'tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or to injure the public interests [9].' It is obvious that many of these cases are not cases of fraud at all, but only cases of the possibility, or at most of the probability, of the commission of that wrong; and they are frowned upon by the law upon the principle of the Statute of Frauds, i. e. the prevention of fraud [10], so far as that offence is concerned. Such cases may be passed by; while on the other hand cases of actual fraud should not be put under this head at all, if confusion would be avoided.

The more usual and legitimate place for the term 'constructive' fraud is in the law of fiduciary relations. But here also it falls short of fraud in meaning; it is only a case of legal suspicion or assumption of fraud, where no fraud may have been. In this sense it does not fall within the definition [11]. A trustee, because of his peculiar position, is not permitted to buy the trust property without putting his *cestui que trust* 'at arm's length' in the transaction, i. e. without giving him full information of all the facts that should influence him, and his rights in regard to them; the *cestui que trust* may have the sale annulled for mere want of such act on the part of the trustee. There need be no fraud at all in the transaction; still the transaction raises a case of constructive fraud. The truth appears to be, that until explained, though often called a case of presumptive as well as constructive fraud, it is a case of suspicion only; and the law arbitrarily declares that if the suspicion is not removed, by the production, on the part of the trustee,

[1] Equity Jur. § 260. [2] Ib. § 292. [3] Ib. § 274. [4] Ib. § 294. [5] Ib. § 295. [6] Ib. § 301. [7] Ib. § 349. [8] Ib. § 384.

[9] Ib. § 258. See *Chesterfield* v. *Janssen*, 2 Ves. 125, 155, 156. Lord Hardwicke calls these cases frauds, not constructive frauds.

[10] The invalidity of contracts of infants and of others under disability might on the same ground be based on fraud; indeed the category might be enlarged indefinitely.

[11] It must have its place however in a work on Fraud.

of evidence of perfect fairness, which is deemed to include full knowledge by the *cestui que trust*, it will be considered that the sale was unfair to the vendor, and so, by a wide construction, fraudulent. This illustration will stand for all transactions of the kind between parties to fiduciary relations.

The term 'constructive' fraud is also applied sometimes, and properly enough, to the case of one who acquires a right or title with notice, actual or implied, of its invalidity or incompleteness. Such a case may be deemed, by the aid of the doctrine of privity, to fall within the definition; but if not, it does not matter, for the case is not one of fraud but of fraud by construction. Between these two there is sometimes difference enough. The definition is not intended to cover constructive fraud.

We have here, where notice binds the right, a class of cases not of real fraud, strictly, but of what is treated in many respects as if it were such. And there is another class, like this one, of *quasi* fraud, which might well be embraced within the designation of constructive fraud. Suppose that through a false but innocent misrepresentation an obligation is apparently created; that obligation is not indeed created by fraud, but if after the truth is learned by the party who made it he should insist upon performance, his conduct would be quite as bad as if he had at first intended to deceive. Hence equity at least, if not a court of law, treats him, in his purpose to enforce performance, as if he had committed fraud [1]. So of certain cases falling within the statute of 13 Elizabeth. If a person really insolvent, but not aware of the fact, should make a voluntary conveyance, the transaction, if impeached by creditors, would be treated by the Courts, notwithstanding the grantor's real innocence of intentional wrong, as if it had been tainted by a fraudulent purpose, so far as might be necessary.

Again, the term 'constructive' fraud is sometimes used for 'legal' fraud, in the special sense in which that term has been used since the beginning of the present century; for 'legal' fraud is also used sometimes in the same loose way as constructive fraud. Lord Kenyon appears to have been the author of the term 'legal' fraud in the particular sense referred to [2]. That sense may best be shown by his own words in the case just cited. 'The defendant,' he says, 'affirmed that to be true, within his own knowledge, which he

[1] See *Redgrave* v. *Hurd*, 20 Ch. D. 1, 12; *Reynell* v. *Sprye*, 1 De G. M. & G. 660, 708, 709; 1 Story, Equity Jur. p. 210, note, 13th ed. In *Redgrave* v. *Hurd*, supra, Jessel M.R. says that the case may be also put thus: 'A man is not to be allowed to get a benefit from a statement which he now admits to be false. He is not to be allowed to say, for the purpose of civil jurisdiction, that when he made it he did not know it to be false; he ought to have found that out before he made it.'

[2] *Haycraft* v. *Creasy*, 2 East, 92, 103 (1801).

did not know to be true. This is fraudulent: not perhaps in the sense which affixes the stain of moral turpitude on the mind of the party, but falling within the notion of legal fraud. . . . The fraud consists, not in the defendant's saying that he believed the matter to be true, . . . but in asserting positively his knowledge of what he did not know [1].

In more recent times judges generally have agreed to call such a case fraud, without any disturbing adjective, and rightly; though Lord Kenyon's associates, to whom the whole subject was still new [2], were not even willing to give it the name of legal fraud. But the truth is, as Lord Kenyon virtually said, and as others have pointed out, such a case is falsehood told *scienter;* for the person who makes such a statement declares by plain implication that he is possessed of knowledge of facts sufficient to justify it; and that, by the very terms of the case, he knows to be false. This, for many years, has been held enough [3]. The fraud is in the means, not in the 'endeavour.'

'Legal' fraud in this sense is then simply fraud, and falls within the definition [4]. The term has nearly gone out of use, and should be dropt [5]; so far as there is occasion anywhere for a term of the kind, the established 'constructive' fraud is sufficient.

Another term is 'fraud upon powers.' The donee of a power ought to exercise the trust only in conformity with its terms, not, e. g. for his own benefit, except in so far as a just interpretation of the power may permit. If, contrary to the same, he should exercise the trust for his own benefit, it would be said that he had committed a 'fraud upon the power.' But there might be no fraud—generally there would be none—properly speaking, in the act; it would have been quite as accurate from the beginning to say that the donee has abused the power. The particular case however may be one of circumvention, and justify the epithet 'fraud.'

The like may be said of many branches of trust. Fraud is often predicated of them in a loose sense. When therefore such cases are treated under the head of fraud, as must often be neces-

[1] See also *Evans* v. *Edmonds*, 13 C. B. 777; *Hart* v. *Swaine*, 7 Ch. D. 42, 46; *Joliffe* v. *Baker*, 11 Q. B. D. 255, 259.

[2] *Pasley* v. *Freeman*, 3 T. R. 51, had been decided only a few years before (1789).

[3] See upon the whole subject the opinion of Mr. Justice Watkin Williams in *Joliffe* v. *Baker*, supra.

[4] It was long ago held that if other conditions of liability were present, there need be no intention to harm the plaintiff. *Foster* v. *Charles*, 6 Bing. 396; s.c., 7 Bing. 105. Hence the words of our definition, 'endeavour to *alter* rights,' not 'to infringe' or 'injure' them. Of course there is an infringement of rights, but not necessarily from endeavour to infringe or injure. The endeavour may be honest enough, in a case like *Haycraft* v. *Creasy*, supra.

[5] See *Weir* v. *Bell*, 3 Ex. D. 238, 243, the well-known remark of Bramwell L. J., that to him 'legal' fraud had no more meaning than 'legal' heat or 'legal' cold.

sary, proper caution should be observed to make any needful distinction, and so to avoid confusion.

Again, it is sometimes said that to allow a person to do a certain thing which he desires to do would 'work' or 'operate' a fraud upon the opposite party. This is commonly said, it is apprehended, at least where it has any real significance, of certain cases of agreement, or matters of duty, in which but for the treatment of the proposed conduct as a fraud there would be no redress or no sufficent redress. And such cases will be found to differ little from cases of fraud in the ordinary, or at least in a familiar sense. The party about to take the unjust advantage may not have intended in the outset to violate the confidence expressed in the extra-legal way; but what matters that if he afterwards entertain the purpose? The case will be one of *quasi* fraud at least, like the one already mentioned. A typical example of this phase of fraud is seen in the equitable doctrine of part-performance, as applied to verbal contracts for the purchase of land, but for which a fraud might be perpetrated under the very guise of law.

Before quitting these various terms we may refer to another, nominally different, but in reality meaning generally much the same thing as fraud. That term is 'surprise.' The term appears to have been taken from the civil and canon laws; it is a very old head of equity, and appears to be used (1) in a literal sense of taking unawares [1], (2) in the sense of preventing one, under sudden and confused impressions, from acting with deliberation in the particular situation [2], and in other senses [3]. The first is a case of fraud clearly; if the rest is not, we are not concerned with it here.

1. According to the definition fraud can only be perpetrated upon rights, i. e. upon legal rights. There may indeed be fraud in morals, where no right under the municipal law may exist; but with this, though it may not differ in its qualities from fraud under the law, we are not concerned. The fraud we are dealing with is the fraud that, when perpetrated, may be matter for the courts to remedy. That such fraud must concern legal rights (or the equivalent) is well established. A single illustration will suffice. By representations which he knows to be false, *A* induces *B* to alter his will, already executed in favour of *C*, and to leave nothing to

[1] The sense, i. e., in which the famous 'surprise' occurred, in the fulfilment of the dark words,

'Fear not, till Birnam wood
Do come to Dunsinane.'

[2] See 1 Story, Equity Jur. § 120, note by Story.

[3] 'If a witness in testifying went beyond the articles, the adverse party could have so much of his testimony suppressed as being a surprise to him.' Langdell, Equity Pl., § 19, referring to the canon law.

C. Discovering the facts after *B*'s death, *C* sues *A* for fraud. The action cannot be maintained, *A* having infringed no legal right of *C*[1].

Whether it be proper to characterise the act of a person in going from his own State or country to another, in which divorces are easy, to obtain a divorce and then to return, as a fraud upon the Sovereign, or in common language as a fraud upon the law; whether to go to Gretna Green to get married is a fraud; whether the act of a person in removing from one place, e. g. in Massachusetts, to another at a certain time of the year, or resorting to other means, to evade payment of taxes, is a fraud;—these and the like questions relating to fraud upon the Sovereign will turn upon the further question, whether the act is an infringement of the law, which, in the case of the Sovereign, is the equivalent of 'legal right' in other cases[2]. These are cases of circumvention indeed, but not necessarily cases of fraud.

2. The fraud, as we have seen, is such without reference to any actual infringement of rights, i. e. without reference to its success; but if it has not been carried out at all, it will be an affair only of the conscience of the man who conceived it. The courts will take cognizance of it, generally speaking, only upon the footing of its success, complete or partial; that is, in the language of the law, upon the footing of damage. But it should be noticed that fraud may be practised without any *view* to the infringement of any right, and without damage; indeed, with benefit to the person made the object of it, as in certain familiar cases of concealed rights. Thus, if the owner of a chattel which I am about to buy from another, represent that he (the true owner) has no claim to it, and I thereupon buy, the owner has been guilty of fraud, in that he has enticed, or what is the same thing in effect, suffered me to buy through a false impression, for which he is in part responsible, in regard to the ownership; and it is only confusing to say, as is sometimes said, that to allow him to recover the property would be to permit him to perpetrate a fraud upon me. He has perpetrated the fraud already; and being the party guilty of wrongdoing, he cannot be permitted to undo it to his own advantage and to my detriment. In other words, he will be estopped to deny the truth of his representation.

3. It will be seen that while fraud practised by deception must be secret, fraud practised by circumvention may be open. Many

[1] *Hutchins* v. *Hutchins*, 7 Hill, 104.

[2] It will be seen that to say that there must be a 'right' to be infringed, including in that term infringement of law against the Sovereign, is not quite the same thing as saying that there must be damage, except in a vague if not confusing sense,—in a sense which makes every common law right of action involve damage. That sense however has some authority for its support.

cases, especially cases falling under the designation of 'fraud upon the law,' show this; some have already been given. It would therefore be erroneous to suppose that fraud necessarily implies secrecy, true though it is that it is almost always practised in secret.

4. In ordinary cases fraud is essentially active in nature, a feature which appears in the definition in the word 'endeavour.' Apart from contract, or from some special duty enjoined by law, I have no right to require information from another. If a party with whom I am dealing does nothing falsely to affect the motives by which my conduct is to be regulated, I cannot complain; he may keep all his information to himself if he will, for surely what a man has locked up in his breast is his own[1]. But if he releases the information, it is no longer his; if he will impart information for my guidance I have a right to the truth, so far as the party can reasonably give it. The information will be a thing of value or of harm to me, according as it is true or false; and I have the same right to it in its purity, as a thing of value, that I have to any tangible thing I may acquire.

One may however endeavour by passive conduct to deceive another, and thus also be guilty of fraud. 'Some special duty' may be enjoined by law, requiring a party to speak, as where two persons are negotiating in the presence and with the knowledge of another for the purchase of property belonging in reality to the latter, but not to the knowledge of the buyer[2]. No duty indeed to speak is created by the mere fact that one man may be aware that someone else, he knows not who, may act to his own prejudice if the true state of things is not disclosed. A man may become aware of the fact that his name has been forged to a negotiable instrument, and so know that it is possible that someone may be led to purchase the paper upon the belief that it is genuine, yet he is not bound, it seems, to take steps to protect persons of whose very existence he may be ignorant[3]. If however the party, in the case of an undisclosed title or right like that above-mentioned, is present at the time of the transaction in question, he must speak, if speaking would probably prevent the action about to be taken; if absent, his silence, to be attended with legal consequences, must at least be of a nature to have an obvious tendency to cause the result. Cases like this, where there is a duty to speak, may properly be deemed to fall within the definition, for they are cases of *misleading* silence[4].

[1] The contract of marine insurance affords an exception resting upon special grounds.
[2] *Pickard* v. *Sears*, 6 Ad. & E. 469.
[3] *Viele* v. *Judson*, 82 N. Y. 32, Finch J., *McKenzie* v. *British Linen Co.*, 6 App. Cas. 82, is not opposed to this.
[4] *Burdick* v. *Michael*, 32 Mich. 246.

The definition finally points, on its face, to either of two broad divisions of the subject:—

One of these is fraud touching rights *in rem* and fraud touching rights *in personam*. Whether such a division could be carried out strictly without doing violence to an established order may be doubted; so to carry it out would require the separation e. g. of parts of the subject of misrepresentation, for that wrong, as we have seen, may be committed against either class of rights. The division may be followed in a general way however; but its chief purpose here has been to make the general terms of the definition somewhat concrete, and to add point to a set of illustrations drawn from all quarters of the subject.

The other division has much more significance for purposes of classification of the parts of the law of fraud; that division is fraud effected by 'deception touching motives,' and fraud by 'circumvention not touching motives,' as at first explained. Now it so happens that this division conforms in the main to the one above suggested; most frauds upon rights *in rem* are effected by deception touching motives; most frauds upon rights *in personam* are effected by circumvention not touching motives. But this is only 'in the main.'

It is more to the purpose of a sound and useful classification, that frauds by 'deception' are in nearly all cases frauds of judge-made law, while frauds by 'circumvention' are with small exception frauds of legislative law. Add to this, that the whole subject of procedure is mostly judge-made law[1], and we may then well divide the law of fraud, consistently with the definition, into Judicial Fraud and Legislative Fraud[2]. So nearly may an empirical division of the subject align with a philosophical a priori division.

MELVILLE M. BIGELOW.

[1] It is apprehended that this is still true in England, notwithstanding the Judicature and like Acts, as it certainly is in the United States.

[2] The classification may be drawn out thus:—

I. Judicial Fraud.
  1. Procedure, in a broad sense.
  2. Constructive Fraud.
  3. Specific Frauds of Deception (a category beginning with technical Deceit).

II. Legislative Fraud.
  Specific Frauds of Circumvention (Statutes of Elizabeth, Bankruptcy Acts, etc.).

RECEIVERS' CERTIFICATES[1].

WHEN a receiver of the property of a railroad company has been appointed, pending the foreclosure of a mortgage upon the road, it sometimes may occur that, in order to the proper preservation of the property and the regular and efficient management of the trust while in the receiver's hands, it is necessary for him to use money beyond the current income. In such a case, upon a proper application, it is usual for the Court to authorize him to borrow money upon the credit of the property. The negotiation of these loans has given rise, within recent years, to a comparatively new form of security, known as a receiver's certificate. This may be defined to be a non-negotiable evidence of debt or debenture issued by authority of a Court of Chancery, as a first lien upon the property of a debtor corporation in the hands of a receiver. Within the past twelve or fifteen years these certificates, to the amount of many millions of dollars, have been issued, and the Courts are constantly authorizing the further issue of them, ostensibly for the preservation of the property and in the interest of the bondholders[2], but it is believed, in a majority of the cases in which they are issued, to the hindrance and delay of a prompt foreclosure, to the impairment of the bondholders' security, and to the scandal of the courts of equity.

Of the Power of the Courts of Chancery to authorize their issue. 'The power of a Court of Equity to appoint managing receivers of such property as a railroad, when taken under its charge as a trust fund for the payment of encumbrances, and to authorize such receivers to raise money necessary for the preservation and management of the property, and make the same chargeable as a lien thereon for its repayment, cannot, at this day, be seriously disputed. It is a part of that jurisdiction, always exercised by the Court, by which it is its duty to protect and preserve the trust funds in its hands. It is undoubtedly a power to be exercised with great caution; and, if possible, with the consent or acquiescence of the parties interested in the fund[3].' This is the language of Bradley J., in delivering the opinion of the Supreme Court of the United States in the leading

[1] From an immediately forthcoming work (New York: L. K. Strouse & Co.) entitled 'Commentaries on the Law of Receivers, with particular reference to the application of that law to railway corporations, but including in detail a complete consideration of the whole subject.'

[2] In speaking of the exercise of the power to issue these certificates Mr. Jones, in his learned work upon Railroad Securities, says:—'This authority of the courts when properly exercised is highly beneficial to the mortgage bondholders.' Jones' Railroad Securities, p. 507.

[3] *Wallace* v. *Loomis*, 97 U. S. 146, 162 (1877).

case of *Wallace* v. *Loomis*, and the rule, as here laid down, is settled law, both in the State and Federal Courts of this country[1]:—'It seems to be settled that a Court of Equity has the power, in this class of cases, to authorize its receiver to issue certificates of indebtedness, and make them a first lien upon the road, for the purpose of raising funds to make necessary repairs and improvements. . . . But it is a power to be sparingly exercised. It is liable to great abuse, and while it is usually resorted to under the pretext that it will enhance the security of the bondholders, it not unfrequently results in taking from them the security they already have, and appropriating it to pay debts contracted by the Court[2].'

From the foregoing extracts from the opinions of the judges it is clear that the Courts of Chancery in this country recognize the receiver's right, in a proper case, to issue these certificates, but that the power is regarded a dangerous one, and one very likely to be abused, and in consequence to be exercised sparingly and with scrupulous regard to the rights of the creditors. Otherwise it is merely a license to do mischief.

The Reason for the Exercise of this Power. It is a settled rule of law that a mortgagee who takes possession under his mortgage, may expend upon the property such sums as are necessary to preserve it from waste or deterioration, to the end that his security may not depreciate in value. In the same way a receiver of the property of a railway company is justified, upon the general principles of equity jurisprudence, acting in reality on behalf of the mortgagees, in expending upon the property such sums as the mortgagees themselves might expend, to stay waste or destruction. In other words, the bondholders, as mortgagees, have the right to maintain the property in repair until the satisfaction of their claim. Accordingly the Court will authorize the receiver to use as much of the current revenues as is necessary to this end. It is his duty, inasmuch as he is operating a railway upon which are devolved, by operation of law, the obligations of a common carrier, to keep the road in a condition suitable and adequate to the safe and

[1] *Union Trust Co.* v. *Illinois Midland R. R. Co*, 117 U.S. 434, 458 (1886); *Miltenberger* v. *Logansport R. R. Co.*, 106 U. S. 286, 309; *Meyer* v. *Johnston*, 53 Ala. 348; *Hoover* v. *Montclair & Greenwood Lake R. R. Co.*, 29 N. J. Eq. 4; *Kennedy* v. *St. Paul & Pacific R. R. Co.*, 2 Dill. 448; s. c., 5 Id. 519; *Bank of Montreal* v. *Chicago, Clinton & Western R. R. Co.*, 48 Iowa, 518; *Taylor* v. *Philadelphia & Reading R. R. Co.*, 7 Fed. Rep. 377; *Jerome* v. *McCarter*, 94 U. S. 734; *Cowdrey* v. *Railroad Co.*, 1 Woods, 331; *Stanton* v. *Alabama &c. R. R. Co.*, 2 Id. 506; *Vermont & Canada R. R. Co.* v. *Vermont Central R. R. Co.*, 49 Vt. 792; s. c., 50 Id. 500, 569.

[2] *Credit Company (Limited) of London* v. *Arkansas Central R. R. Co.*, 15 Fed. Rep. 46, 49; s. c., 23 Am. Law Reg. (N. S.) 35, and see the note thereto by Mr. Adelbert Hamilton, pp. 44–49.

rapid transportation of passengers and freight. There is upon this ground a stronger reason for allowing a receiver of property of this sort to expend money upon its maintenance and preservation than exists in favour of such an allowance to an ordinary mortgagee. This reason is grounded in that rule of municipal economy which requires the public highways to be kept in repair. The public is entitled to protection in the continued use of the railway as a king's highway. Accordingly upon this ground, when the current revenues are inadequate, the receiver may borrow money upon the security of the property for the preservation of it.

'If it were not for the public quality belonging to them,' said Manning J., in *Meyer* v. *Johnson*[1], 'for the injury that would be done to the interests of whole communities that have become dependent on a railroad for accommodation in a thousand things, a Chancellor might say to the parties most interested, unless you furnish means for the protection of this property, which does not itself afford an adequate income for the purpose, it may become a dilapidated and useless wreck. But the inconvenience and loss which this would inflict upon the population of large districts, coupled with the benefit to parties who perhaps are powerless to take care of themselves, of preventing the rapid diminution of value, and derangement and disorganization that would otherwise result, seem to require, not for the completion of an unfinished work, or the improvement, beyond what is necessary for its preservation, of an existing one, but to keep it up, to conserve it as a railroad property, if the Court has been obliged to take possession of it, that the Court should borrow money for that purpose, if it cannot otherwise do so in sufficiently large sums, by causing negotiable certificates of indebtedness to be issued, constituting a first lien on the proceeds of the property and redeemable when it is sold or disposed of by the Court[2].'

The Order Authorizing the Issue can only be made on Notice to all the Parties in Interest. It is fundamental that an order for the issue of the certificates can be lawfully made only after due notice to all the parties in interest and after a full hearing, all parties being represented, as to the necessity or propriety of the expenditure proposed[3].

[1] 53 Ala. 237, 348.

[2] In the luminous opinion in this case the whole law of receivers' certificates is canvassed, and in the excellent briefs of counsel, included in the report, there is an exhaustive collection of the authorities down to the year 1875, when the case was reported. No study of the subject can be complete without a careful reading of this case.

[3] *Ex parte Mitchell*, 12 S. C. 83; *Meyer* v. *Johnston*, 53 Ala. 237, 349; *Wallace* v. *Loomis*, 97 U. S. 146, 163. Cf. *Union Trust Co.* v. *Illinois Midland R. R. Co.*, 117 U. S. 434, 463.

A notice to the trustees of the mortgage is, however, notice to the bondholders. The bondholders are represented by the trustees, and if the trustees were parties to the foreclosure suit, and had due notice of the application and made no objection to its being granted, the bondholders cannot be heard to claim a want of notice. So far as concerns the power of the Court to act in making the order, and so far as the interests of third persons acting upon the faith of it might be affected, the notice to the trustees is notice to all the bondholders [1].

The Order is to be strictly construed. The validity of the certificate depending wholly upon the order of the Court, whose officer the receiver is, it is held that the terms of the order are to be strictly construed. The certificate must be issued precisely as the order provides—and for the express purpose proposed. The force and intent of the order are not to be extended by implication [2]. Accordingly, where an order appointing a receiver of a railroad company authorized him to issue certificates 'for money borrowed, material furnished or labour performed,' such certificates to be treated as receiver's indebtedness, and to constitute a first lien on the road, it was held that the receiver was not authorized to issue certificates in payment for material until it had been furnished, and that certificates issued for material contracted to be delivered, but which in fact never was delivered, were void, and that, inasmuch as they recited upon their face that they were issued under an order of the Court, 'whether under the order the receiver had the power to issue negotiable securities, or for property agreed to be delivered at a future day, were legal questions which the plaintiff was bound to determine at his peril [3].' Neither can certificates be lawfully issued at a higher rate of interest than that allowed by law [4].

For what Specific Purposes Certificates may be issued. (*a*) *In General.* The rule of first and essential consequence upon this point ought to be that the expenditure contemplated is absolutely necessary in order to preserve the property from destruction or serious injury. This was the pretence upon which the issue of receivers' certificates was at first attempted to be justified, and in the earlier cases it will be found to have been always the reason assigned. But latterly the Courts have shown a tendency to relax little by little

[1] *Wallace* v. *Loomis*, 97 U. S. 146, 163; *Union Trust Co.* v. *Illinois Midland R. R. Co.*, 117 U. S. 434, 463.

[2] See *Tennessee* v. *Edgefield & Kentucky R. R. Co.*, 6 Lea, 353. Cf. *Newbold* v. *Peoria & Springfield R. R. Co.*, 5 Bradw. 367.

[3] *Bank of Montreal* v. *Chicago, Clinton & W. R. R. Co.*, 48 Iowa, 518, 524. Cf. *Bank of Montreal* v. *Thayer*, 7 Fed. Rep. 622.

[4] *Meyer* v. *Johnston*, 53 Ala. 237, 351.

somewhat of the strictness of this rule, and to authorize the issue of these debentures for a variety of purposes. The Supreme Court of the United States, speaking generally, has held that they may lawfully be authorized 'to raise money necessary for the preservation and management of the property[1].' 'No limit,' says Mr. High[2], 'has been fixed as to the purposes for which receivers' certificates may be issued, other than that they shall be germane to the objects of the receivership, and necessary to the proper administration of the trust.' The just criterion of the propriety of the issue of receivers' certificates ought to be the necessity of the expenditures for which it is proposed to raise means[3]; and beyond this the Courts, at least in theory, do not seem inclined to go[4]. In succeeding sections, however, the consideration in detail of the cases in which certificates have been authorized will go far to show that in practice the Courts have exercised their power in this respect very liberally.

(*b*) *For the Preservation of the Property.* A mortgagee in possession may expend upon the mortgaged property such sums as are necessary to his own protection. He is entitled to keep his security unimpaired. In accordance with this principle we find that, in a case where it appeared by the report of the receiver that the railroad property was in such need of repairs that it could not be operated with safety to the travelling public, the Court authorized the receiver to make the repairs and—the current income not being sufficient—to issue receivers' certificates of indebtedness therefor, and declared the expenditure to have been incurred for the benefit and protection of the property[5]. Again, the issue of certificates has been authorized for the purpose of putting the road in repair, and for its operation and for the purchase of such rolling stock as was necessary[6]. The receiver may be authorized to borrow money upon his certificates 'not for convenience or ornament; not to lay out money in ways not essential to the preservation of the property, although the Court may think the value of it will be thus increased; not for the completion of an unfinished work, or the improvement, beyond what is necessary for the preservation of an existing one—but to keep it up, to conserve it as a railroad

[1] *Wallace* v. *Loomis*, 97 U. S. 146, 162.
[2] High on Receivers (2nd edition), § 398 (d).
[3] Jones on Railroad Securities, § 533 et seq.; *Cowdrey* v. *Galveston &c. R. R. Co.*, 1 Woods, 331.
[4] *Shaw* v. *Railroad Co.*, 100 U. S. 605, 612; *Meyer* v. *Johnston*, 53 Ala. 237, 348.
[5] *Hoover* v. *Montclair & Greenwood Lake R. R. Co.*, 29 N. J. Eq. 4; *Credit Co. (Limited) of London* v. *Arkansas Central R. R. Co.*, 15 Fed. Rep. 46.
[6] *Vermont & Canada R. R. Co.* v. *Vermont Central R. R. Co.*, 50 Vt. 500, 569; *Wallace* v. *Loomis*, 97 U. S. 146, 162. Cf. *Union Trust Co.* v. *Chicago & Lake Huron R. R. Co.*, 7 Fed. Rep. 513.

property pending litigation[1].' In Pennsylvania however it is a question whether the Court has the power to grant receivers of a railroad authority to create a car-trust loan to provide for the rolling stock and equipments of the road, when the income of the road is sufficient to meet that expense, the income being applied instead to pay interest to bondholders. The judge said:—'To the extent that the earnings of the road are required to keep it up in stock and equipments, and to preserve the property, the receivers have authority so to apply it; but to borrow money to enable them to continue to pay interest to bondholders I consider unwise[2].'

(*c*) *For Operating Expenses.* It is the receiver's duty—indeed his principal duty—pending the foreclosure proceedings, and while the property is in his hands, to operate the road. This is required not only by the duty which is owed to the public, but also by a proper regard to the interests of the bondholders. In order to be of any value as a security for their advances the road must be kept a 'going concern.' The receiver may, therefore, properly issue certificates to meet operating expenses, in default of sufficient current income[3]; to procure necessary rolling stock, machinery, and supplies[4]; to pay off tax liens upon the property[5], or to replace earnings diverted from operating expenses and ordinary repairs[6]. So also where it was necessary to insure the safety of the trains, that a portion of the track which had been hastily built should be relaid in a substantial manner, the receiver's certificates to meet the expense were approved[7]. And in another case, where the receivers found upon taking possession of the property that several locomotives were in use by the company, under a lease from the maker, for which the rent was unpaid, they were authorized to issue certificates to pay the rent[8].

[1] 'The Doctrine of Receivers' Certificates,' by R. F. Stevens, jun., 23 Cent. Law Jour. 340, citing *Meyer* v. *Johnston*, 53 Ala. 237, 346; *Jerome* v. *McCarter*, 94 U. S. 734; *Bank of Montreal* v. *Chicago &c. R. R. Co.*, 48 Iowa, 518; *Barton* v. *Barbour*, 104 U. S. 126; *Union Trust Co.* v. *Chicago &c. R. R. Co.*, 7 Fed. Rep. 513; *Turner* v. *Peoria &c. R. R. Co.*, 95 Ill. 134; *Swann* v. *Clark*, 110 U. S. 602.

[2] *In re Philadelphia & Reading R. R. Co.*, 14 Phila. 501, 502; s. c., *sub nom.*, *Taylor* v. *Philadelphia & Reading R. R. Co.*, 9 Fed. Rep. 1.

[3] *Turner* v. *Peoria &c. R. R. Co.*, 95 Ill. 134; *Stanton* v. *Alabama &c. R. R. Co.*, 2 Woods, 506; *Meyer* v. *Johnston*, 53 Ala. 237, 346; *Hoover* v. *Montclair &c. R. R. Co.*, 29 N. J. Eq. 4; *Swann* v. *Clark*, 110 U. S. 602. But see *Metropolitan Trust Co.* v. *Tonawanda Valley &c. R. R. Co.* 103 N. Y. 245.

[4] *Swann* v. *Clark*, 110 U. S. 602. But see *In re Philadelphia & Reading R. R. Co.*, 14 Phila. 501.

[5] *Union Trust Co.* v. *Illinois Midland R. R. Co.*, 117 U. S. 434; *Humphrey* v. *Allen*, 101 Ill. 490. Cf. *Taylor* v. *Philadelphia &c. R. R. Co.*, 7 Fed. Rep. 377 and 386.

[6] *Union Trust Co.* v. *Illinois Midland R. R. Co.*, 117 U. S. 434.

[7] *Stanton* v. *Alabama & Chattanooga R. R. Co.*, 2 Woods, 506; *Credit Co.* (*Limited*) *of London* v. *Arkansas Central R. R. Co.*, 15 Fed. Rep. 46. Cf. *Barton* v. *Barbour*, 104 U. S. 126.

[8] *Coe* v. *New Jersey Midland R. R. Co.*, 27 N. J. Eq. 37. See also *Turner* v. *Peoria & Springfield R. R. Co.*, 95 Ill. 134.

(*d*) *For the payment of Debts due to Employees and for Material and Supplies incurred prior to the Receivership.* There is to be found some authority for the rule that a receiver may be allowed to issue certificates in payment for labour, materials, supplies and taxes upon the property due prior to his appointment [1]. But in New York, in a recent case, wherein the issue was fairly presented, the Court of Appeals held—reversing the lower Court—that a Court in that State had no power to authorize a receiver to pay, or to issue his certificates of indebtedness in payment for labour and services in operating the road prior to his receivership, and to make the certificates so issued a lien prior to the mortgage [2]. In passing upon this point the Court said:—'Notwithstanding the argument of the respondent's counsel, we are unable to discover any principle upon which the claims of the employees, for labour performed before the appointment of the receiver, can be so extended as to diminish, or impair or postpone the lien of the mortgage for the enforcement of which the action is brought, or the lien of the mortgage set up by the Farmers' Loan and Trust Company. Both are prior in point of time to the respondent's claims, and we are referred to no statute which displaces them.'

This, in the absence of a statutory regulation of the matter, is, it is believed, the correct rule. Now, however, there is a statute in New York by which a different relation is established between the receiver of an insolvent railroad corporation and its employees—and under which the receiver is obliged to pay the wages of the employees in preference to all other debts or claims, no distinction being made between wages earned before and those earned after the appointment [3].

Where, upon an application for the distribution of the surplus moneys arising upon the foreclosure of a mortgage, subject to which the Rockaway Beach Improvement Company had purchased the mortgaged premises, it appeared that after the purchase, and in April, 1880, the company executed a mortgage on the same property to one Soutter, trustee, to secure the payment of certain bonds; that in August, 1880, the company becoming embarrassed, one Attrill, a large stockholder, brought an action against it, to which neither the trustee of the mortgage nor the holders of bonds thereunder were made parties, praying for the appointment of a receiver and the dissolution of the company. An order having been made in this action appointing a receiver,

[1] *Humphreys* v. *Allen*, 101 Ill. 490; *Taylor* v. *Philadelphia & Reading R. R. Co.*, 7 Fed. Rep. 377.

[2] *Metropolitan Trust Co.* v. *Tonawanda Valley &c. R. R. Co.*, 103 N. Y. 245 (1886), s. c., 1 Ry. & Corp. L. J. 65; reversing s. c., 40 Hun, 80 (1885).

[3] Laws of New York, 1885, chap. 376.

and thereafter *ex parte* orders being made authorizing the receiver to borrow a large sum to pay wages due the workmen, and to issue certificates therefor, such certificates to be a first lien upon all the property of the company, and to have priority over the mortgage to Soutter, it was held that there was no principle upon which the claims of employees for labour performed before the receiver was appointed could be so extended as to impair or postpone the lien of the mortgage, and that affidavits showing that the property was in danger of being destroyed by the unpaid workmen unless such certificates were issued did not authorize the Court to make the order. The Court said:—'After a careful examination of the case we think that the weight of authority is not of an order which sets aside liens to the advantage of a general creditor; that it is only the income of the property which Courts apply to the payment of current expenses before the mortgage debt is paid; that it is not right to entirely displace the lien. There were no earnings, and there are no receivers' certificates which have a right of payment before the Soutter mortgage[1].'

(*e*) *For the Completion of the Road.* The Supreme Court of the United States has approved of receiver's certificates that were issued to pay for finishing a canal, in aid of which the government had made a grant of land, conditioned upon the completion of the canal within a fixed time, saying, per Strong J.:—'Hence there was a necessity for making the order which the Court made, a necessity attending the administration of the trust which the Court had undertaken. The order was necessary alike for the lien creditors and for the mortgagors[2].'

And where it appeared that it was necessary to complete a portion of the road in order to secure a land grant, which was a material part of the security of the bondholders, Mr. Justice Dillon, sitting at Circuit, authorized the receiver to borrow money and complete the road within the prescribed time. 'It is manifest,' he said, 'that unless a receiver is appointed no further work will be done on the extension lines, and that the land grant, which is the only security of any considerable value which the plaintiffs and the other bondholders have for their large advances, will lapse and be wholly lost. In order to save this land grant the road must be completed by December 3rd ensuing, and it seems to me that the exigencies of the case are such as, under the circumstances, to warrant the Court, upon the application of the parties chiefly in-

[1] *Rahl* v. *Attrill*, 42 Hun, 414, 418 (1886), citing *Burnham* v. *Bowen*, 111 U. S. 776, 782.
[2] *Jerome* v. *McCarter*, 94 U. S. 734, 738.

terested, to appoint a receiver and clothe him with the authority desired[1].'

In Iowa also the Court of last resort has approved of the issue of certificates by a receiver for the purpose of completing and building certain portions of the road in his hands, at the rate of $8,000 per mile upon the whole road completed and to be completed, making the outlay a first lien upon the property[2].

A Qualification of this Rule. In *Shaw* v. *Railroad Company*[3] it is held that, except under very extraordinary circumstances, the power of the Court ought never to be exercised to enable the trustees, where the road is unfinished, to borrow money by means of a receiver's certificate which creates a paramount lien upon the property, in order to complete the work. In the opinion Waite C. J. said:—'The power of the Courts ought never to be used in enabling railroad mortgagees to protect their securities by borrowing money to complete unfinished roads, except under extraordinary circumstances. It is always better to do what was done here whenever it can be, that is to say, reorganize the enterprise on the basis of existing mortgages as stock, or something which is equivalent, and by a new mortgage, with a lien superior to the old, raise the money which is required, without asking the Courts to engage in the business of railroad building.' And in another case, in speaking to this point, it is aptly said:—'It is no part of the duty of a Court of Chancery to build railroads, and the assent of all parties interested in the property cannot make it one[4].'

It is plain that an unlimited exercise of power by the Court in this direction would amount to improving the mortgagor out of his property[5]. Accordingly the Court will construe strictly an authority granted to the receiver to construct a road, and a mere authority to borrow money to build will not authorize the receiver to contract for municipal aid in the work[6]. And an issue of certificates for such a purpose in excess of the amount authorized is beyond the power of the receiver, and the certificates are void[7].

[1] *Kennedy* v. *St. Paul & Pacific R. R. Co.*, 2 Dill. 448; s. c., 5 Dill. 519. The form of the order in this case may well be consulted; it is said by Mr. Jones to be 'most carefully drawn.' Jones on Railroad Securities, § 535, n. See also *Jerome* v. *McCarter*, 94 U. S. 734, to which reference is made supra.

[2] *Bank of Montreal* v. *Chicago, Clinton &c. R. R. Co.*, 48 Iowa, 518; Acc. *Gilbert* v. *Washington, Virginia Midland &c. R. R. Co.*, 33 Gratt. 586, 645; *Southerland Trustee &c.* v. *Lake Superior Ship Canal R. R. & Iron Co.* (U. S. Dist. Ct. Mich. E. D.), MS., cited in *Meyer* v. *Johnston*, 53 Ala. 237, 338; *Hyde* v. *Sodus Point &c. R. R. Co.* (N. Y. Sup. Ct.), MS. Id.

[3] 100 U. S. 605, 612.

[4] *Credit Co. of London* v. *Arkansas Central R. R. Co.*, 15 Fed. Rep. 46. To the same effect see *Vermont & Canada R. R. Co.* v. *Vermont Central R. R. Co.*, 50 Vt. 500, 569; s. c., 46 Id. 792, and cf. *Secor* v. *Toledo, Peoria & Warsaw R. R. Co.*, 7 Biss. 513.

[5] *Sandon* v. *Hooper*, 6 Beav. 246; 2 Jones on Mortgages, § 1126.

[6] *Smith* v. *McCullough*, 104 U. S. 25, 29.

[7] *Newbold* v. *Peoria & Springfield R. R. Co.*, 5 Bradw. 367.

The Priority of the Lien created by the Certificates. Receivers' certificates are, as a rule, expressly declared, by the order of the Court under which they are issued, to be a first lien upon the entire property, income and franchises of the road. There has been, therefore, but little litigation thus far upon this point. The theory of the matter is this:—The expenditure is necessary to preserve the property; the mortgagee assents to the expenditure; the Court orders it to be made; it is, therefore, properly a lien prior to the mortgage, and must be paid first. These facts, or some others equivalent thereto, and the order of the Court declaring the lien, are usually recited in the body of the certificate itself. The power of a Court of Equity to authorize the issue of certificates by the receiver, and to make them a first lien upon the property, payable before the first mortgage bonds, is not questioned in any of the cases in our State or Federal reports. It has been expressly upheld in many leading cases [1].

Thus, in a leading case, it was held that, where a railroad and its appurtenances are in the hands of a receiver to be preserved and operated, the Court having charge thereof must possess the power, after the notice to and hearing of the parties interested, to allow the issue even of negotiable certificates of indebtedness creating a first lien, when this is necessary to raise money for the economical management and conservation of the property until it shall be disposed of; and the proper mode of objecting to any order authorizing such issue is by application to the Chancellor to vacate and set it aside [2]. And again, by the Supreme Court of the United States, in a recent case, the position is taken that, where receivers' certificates are issued for necessary repairs, or to pay tax liens, or to replace earnings diverted from the payment of operating expenses and ordinary repairs, they create a lien, prior to the bonds, on the *corpus* of the property; and further, that the holders of interest-bearing receivers' certificates, taken within the limit of discount allowed by the Court in the order authorizing the certificates to be issued, are entitled to the face of the certificates and the interest [3].

We find, therefore, that the Courts do not hesitate to create these liens upon mortgaged property, and that the legality and validity of receivers' certificates, as first liens, are not disputed in the reported

[1] *Credit Co. of London* v. *Arkansas Central R. R. Co.*, 15 Fed. Rep. 46; *Wallace* v. *Loomis*, 97 U. S. 146, 162; *Miltenberger* v. *Logansport R. R. Co.*, 106 U. S. 286, 309; *Union Trust Co.* v. *Illinois Midland R. R. Co.*, 117 U. S. 434, 451, 454; *Stanton* v. *Alabama &c. R. R. Co.*, 2 Woods, 506; *Hoover* v. *Montclair & Greenwood Lake R. R. Co.*, 29 N. J. Eq. 4.

[2] *Meyer* v. *Johnston*, 53 Ala. 237, 350.

[3] *Union Trust Co.* v. *Illinois Midland R. R. Co.*, 117 U. S. 437.

cases [1]. If, however, prior encumbrancers do not assent to the lien of the receivers' certificates, they must be made expressly subject to the prior mortgages [2].

The Right to create such a Priority challenged. Conceding the right of a Court of Equity in these cases to create a prior lien upon property already subject to a mortgage, where there is a unanimous consent by the mortgage bondholders that it be done, it still remains true that the creation of a lien such as this procedure contemplates, and to the extent to which our Courts have carried the practice, 'marks,' in the language of Mr. High, 'the extreme limit which Courts of Equity have thus far attained in the exercise of their extraordinary jurisdiction [3].'

In theory the outlay contemplated is for the benefit of the mortgagee, and he is assumed to consent to the creation of the lien. Where both these elements enter into the case the lawfulness of the issue is not questioned. But, practically, the proceeds of the certificates are employed to pay for many things not for the benefit of the mortgagee, or the preservation of his security, and his consent is only colourable and constructive. If the trustee have notice and do not oppose the motion, the bondholder, though he object never so strenuously, will be held to assent. The schoolboy creeps like snail unwillingly to school. In some sense he goes voluntarily, but he goes because he cannot stay away. He goes voluntarily, and so consents to go, because he is compelled and cannot make a successful resistance. In a majority of cases where receivers' certificates are made a prior lien upon railroad property some portion at least of the holders of the senior liens give no more voluntary consent to the issue than this. They assent because it is idle to oppose.

Now nothing is clearer than that this impairs the obligation of the contract between mortgagor and mortgagee. What the State cannot do, and what the Federal Government must not do, a Court of Chancery ought to hesitate to do [4]. It cannot be seriously questioned that the exercise of this power by the Courts impairs, *quoad hoc*, the

[1] Upon the general question of priority in these cases, see *Dunham* v. *Cincinnati &c. R. R. Co.*, 1 Wall. 254; *Huidekoper* v. *Locomotive Works*, 99 U. S. 258; *Denniston* v. *C. A. & St. L. R. R. Co.*, 4 Biss. 414; *Duncan* v. *Mobile & Ohio R. R. Co.*, 2 Woods, 542; *Brown* v. *Erie Ry. Co.*, 19 How. Prac. 84; *Vatable* v. *New York &c. R. R. Co.*, 96 N. Y. 49; *Turner* v. *Indianapolis &c. R. R. Co.*, 8 Biss. 315; *Atkins* v. *Petersburg R. R. Co.*, 3 Hughes, 307; *Davis* v. *Gray*, 16 Wall. 203; *Douglas* v. *Cline*, 12 Bush, 608; *Tomney* v. *Spartenburg &c. R. R. Co.*, 4 Hughes, 640; *Kelly* v. *Receiver of Green Bay &c. R. R. Co.*, 10 Biss. 151; s. c., 5 Fed. Rep. 846; *Calhoun* v. *St. Louis &c. R. R. Co.*, 9 Biss. 330; *Ellis* v. *Boston, Hartford & Erie R. R. Co.*, 107 Mass. 28; *Coe* v. *C. P. & I. R. R. Co.*, 10 Ohio St. 372; *Gurney* v. *Atlantic &c. R. R. Co*, 58 N. Y. 358; *Union Trust Co.* v. *New York &c. R. R. Co.*, 25 Fed. Rep. 803.

[2] *In re United States Rolling Stock Co.*, 55 How. Prac. 286.

[3] High on Receivers (2nd ed.), § 398, *c.*

[4] Cf. Jones on Railroad Securities, § 539.

obligation of the mortgage contract, and in practice it is notorious that it frequently diverts a large portion of the mortgage security [1]. It is little short of monstrous that a Court of Chancery should assume the exercise of such a power, and unless the Courts themselves recede from the position lately taken upon this question, and abandon the pernicious practice of authorizing receivers' certificates for any other purpose than to preserve the property from destruction, or to protect the public in the use of the highway, and of making such certificates a lien prior to the mortgage liens, except by the unanimous and expressed personal assent of the bondholders, the legislature must be invoked, and we shall present to the eye of the world the unseemly spectacle of legislatures—such as we have in this country—enacting statutes to prevent plunder and the impairment of contracts by the Courts of Chancery [2]!

Statutory Provisions in reference to the Lien of Receivers' Certificates. In some of the States receivers are authorized by statute to borrow money and to create liens upon the mortgaged property in their hands. Thus, in New Jersey, the receiver of an insolvent railway corporation is empowered to operate the road, and all his expenses incident to the proper operation of it are made a first lien upon the receipts, and must be paid before any other encumbrance whatsoever [3]. So also in Ohio the statute provides that the earnings of a railroad, in the hands of a receiver, shall be first applied to the costs and expenses of the suit and to operating expenses, and for the satisfaction of judgments recovered against the receiver for injuries to persons or property, and for servants' wages or materials furnished during the period of the receivership [4]. And in Vermont [5] and in some other States there are statutory regulations as to the matter of receiver's expenditures and liens [6].

The Negotiability of Receivers' Certificates. A receiver's certificate is a debt not of the company, but of the receiver as an officer of the

[1] The late Judge Baxter, of the United States Circuit Court, for the Sixth Circuit, in the unsavoury Pease Receiver case, and elsewhere, is reported to have expressed himself strongly against the practice of issuing receivers' certificates. See 11 Chicago Legal News, 8, where a case is cited of a Georgia railroad which cost $15,000,000; the receiver in three years issued certificates to the amount of $1,500,000, and upon a sale the road did not bring enough to redeem the certificates. In another case, in Michigan, when a road which had cost $8,000,000 came to be sold at the termination of a receivership, the counsel asked the Court to fix the minimum price, so that enough might be secured to pay the receiver and his counsel. Ibid.

[2] See the chapter on Receivers' Certificates in 'An Investor's Notes on American Railways,' by John Swann: G. P. Putnam & Sons, New York, 1886. See also *Williams* v. *Washington City &c. R. R. Co.*, 33 Gratt. 586, 624; *Blythe* v. *Lewis*, 75 Va. 701; *Skiddy* v. *Atlantic &c. R. R. Co.*, 3 Hughes, 320; *Jessup* v. *Atlantic & Gulf R. R. Co.*, 3 Woods, 441; *Hale* v. *Frost*, 99 U. S. 389.

[3] Revision of N. J. 1877, 196, § 106.

[4] Laws of Ohio, 1872, 31, §§ 1, 3, 4.

[5] Genl. Stat. 1870, 924; Acts of 1866, No. 41, page 53.

[6] See Wood on Railways, § 483, page 1677; Jones on Railroad Securities, § 544.

Court appointing him. The faith of the Court is pledged to its payment, at least to the extent of the property in the receiver's hands [1]. But if the fund or property be not sufficient to pay all the certificates in full, the holders of them are entitled to a *pro rata* share of the proceeds [2]. Again, receiver's certificates are not commercial paper. They generally consist rather of an acknowledgment of indebtedness than of an express promise to pay. The fund upon which they are drawn is usually uncertain, and there is no one personally liable for their payment. The fund in the receiver's hands is alone bound for their redemption, and their payment can be compelled only by an application to the Court by whose authority they were issued. It is, therefore, the ordinary rule that they are not negotiable instruments [3]. Their transfer by assignment, or even by delivery when made payable to bearer, enables the purchaser or assignee to recover upon them only to the extent of the first payee. They can be enforced against the property, even in the hands of *bona fide* holders, only to the extent of the money actually advanced by the first taker to the receiver [4]. And the assignor or endorser is not liable as a guarantor or endorser of commercial paper; nor does the assignment of them import a warranty that they are collectable or that they will be paid [5].

The Invalidity of Certificates issued irregularly or without Consideration. It follows from the fact that these certificates are non-negotiable instruments that, when they are issued without consideration, they are invalid, even in the hands of a *bona fide* holder for value. Accordingly where, under a contract for the purchase of rails, a receiver issued certificates which recited the order of Court and were payable to bearer, in a suit to enforce their redemption brought by an innocent holder to whom the certificates had been transferred, it appearing that the rails had never been tendered or delivered to the receiver, it was held that there could be no recovery, upon the ground that, inasmuch as the certificates themselves referred on their face to the order under which they had been issued, the holder was bound to take notice of the limitation of the receiver's power, and to know whether the certificates had been lawfully issued [6].

[1] *Meyer* v. *Johnston*, 53 Ala. 349.
[2] *Turner* v. *Peoria & Springfield R. R. Co.*, 95 Ill. 134.
[3] *Turner* v. *Peoria & Springfield R. R. Co.*, 95 Ill. 134; *Bank of Montreal* v. *Chicago &c. R. R. Co.*, 48 Iowa, 518; *Union Trust Co.* v. *Chicago & Lake Huron R. R. Co.*, 7 Fed. Rep. 513; *McCurdy* v. *Bowes*, 88 Ind. 583; *Stanton* v. *Alabama &c. R. R. Co.*, 2 Woods, 506; *Newbold* v. *Peoria &c. R. R. Co.*, 5 Bradw. 367; *Central National Bank of Boston* v. *Hazard*, 1 Ry. & Corp. L. J. 347 (U. S. Circ. Ct. Northern District of N. Y., March, 1887); Wood on Railways, p. 1676.
[4] *Stanton* v. *Alabama &c. R. R. Co.*, 2 Woods, 506.
[5] *McCurdy* v. *Bowes*, 88 Ind. 583.
[6] *Bank of Montreal* v. *Chicago, Clinton & Western R. R. Co.*, 48 Iowa, 518.

The same rule is laid down in the leading case of *Stanton* v. *Alabama & Chattanooga Railroad Company*[1], in the following luminous language:—'I entirely agree with the Master that these certificates have not the quality of negotiable instruments by the law merchant. In my judgment power conferred upon receivers to issue certificates does not authorize the issue of a bond, or other negotiable instrument, which shall be good in the hands of a *bona fide* holder for value, no matter what vice or infirmity may attend its original creation. The paper issued must be governed by the authority under which it is issued, and not by the form the receivers may choose to give it.' The Master's report, to which reference is made in the preceding quotation from Mr. Justice Woods' opinion, contained the following discriminating language concerning the nature and quality of these, at that time, comparatively new securities:—'These securities, until within a few years, were unknown: they are all directed to be issued by special appointees of the Court, clothed with special and limited authority; and in relation to a particular case. On their face they refer to the particular power thus conferred, and to the particular case then pending in the Court. This is a sufficient notice to put a prudent dealer on inquiry. The order imperatively declares that the certificate should not be disposed of at less than ninety cents on the dollar. Any act by the receiver which disposes of them at less than ninety cents is *ultra vires*. The first taker would derive no title from such a transaction, and a subsequent holder would occupy no better position. These certificates may be likened to the English debentures of a business corporation, as to which it has been well settled that, when issued by the directors without due authority, under the seal of the company, they cannot be enforced by members of the company who accepted them after being present at the meeting when the irregular issue was sanctioned, and a *bona fide* transferee of such debentures from such shareholders will stand in no better position, nor can strangers or their assignees enforce them where they were accepted by the first holders with knowledge that the condition on which they were issued had not been fulfilled[2].' This seems to be the position uniformly taken by the Courts upon this point, and the later cases are to the same effect[3]. It is also held that the negotia-

[1] 2 Woods, 506, 515.

[2] *Stanton* v. *Alabama &c. R. R. Co.*, 2 Woods, 506, 512, citing *In re Magdalena Steam Navigation Co.*, Johns. (Eng. Chan.), 690; s. c., 6 Jur. (N. S.) 975. The late Mr. Philip Phillips, of Washington City, was the Master from whose report the preceding extract is made.

[3] *Turner* v. *Peoria & Springfield R. R. Co.*, 95 Ill. 134; *Bank of Montreal* v. *Chicago, Clinton &c. R. R. Co.*, 48 Iowa, 518; *Baird* v. *Underwood*, 74 Ill. 176; *Husband* v. *Epping*, 81 Id. 172; *Newbold* v. *Peoria &c. R. R. Co.*, 5 Bradw. 377. Cf. *West*

tion and sale of certificates is a trust personal to the receiver, which he cannot delegate to an agent in such a way as to relieve himself from responsibility [1]. The purchaser buys at his peril; he must know whether the terms of the order under which the issue has been made have been duly complied with [2]. Accordingly an over-issue is void, even in the hands of *bona fide* holders for value [3]. But when money is advanced in good faith upon such an over-issue of certificates, and is used by the receiver in payment of over-due coupons for interest upon the mortgage indebtedness, the persons advancing the money may be subrogated to the rights of the coupon holders, and may receive the proportion due to such coupons out of the proceeds of the foreclosure sale upon final distribution [4]. But if a receiver execute and place upon the market certificates containing false and fraudulent representations intended to deceive purchasers, he is personally liable thereon in an action for damages brought by one who purchases the certificates in good faith, relying upon such representations [5].

Who may question the Validity of Receivers' Certificates; when the Question may be raised. Although, as has already appeared, receivers' certificates are not negotiable instruments, yet if a receiver in foreclosure proceedings be authorized to issue them in payment for operating expenses, rentals, taxes and improvements incurred before his appointment, a bondholder desiring to question their validity and priority of lien must do so before they are sold. And if, with knowledge of the facts, he permits them to be sold without objection, both he and those claiming under him with notice of the facts will not afterwards be heard to question the payment of the certificates in full out of the proceeds of the foreclosure sale, prior to a distribution among the bondholders [6]. Particularly will the bondholders be bound by the issue, when they appoint a committee of their own number to represent them in matters pertaining to the management of the property, and the committee consents to the issue of the certificates [7]. Upon the same

v. *Foreman*, 21 Ala. 400; *Corbett* v. *State*, 24 Ga. 287; *Harriman* v. *Sanborn*, 43 Me. 128; *Railroad Co.* v. *Howard*, 7 Wall. 392, 415; *Mechanics' Bank* v. *New York & New Haven R. R. Co.*, 13 N. Y. 599; *Voshell* v. *Hanson*, 36 Md. 92; *Union Trust Co.* v. *Souther*, 107 U. S. 591; *Fosdick* v. *Schall*, 99 U. S. 235; *Fosdick* v. *Car Co.*, Id. 256; *Bright* v. *North*, 2 Phila. 216.

[1] *Union Trust Co.* v. *Chicago & Lake Huron R. R. Co.*, 7 Fed. Rep. 513. In this case, where one purchased certificates from an agent or broker of the receiver at a considerable discount, and the agent did not account to the receiver for the proceeds, it was held that the purchaser could not recover upon the certificates.

[2] *Bank of Montreal* v. *Chicago &c. R. R. Co.*, 48 Iowa, 518.

[3] *Newbold* v. *Peoria &c. R. R. Co.*, 5 Bradw. 367.

[4] Ibid.

[5] *Bank of Montreal* v. *Thayer*, 7 Fed. Rep. 622.

[6] *Humphreys* v. *Allen*, 101 Ill. 490. Cf. *Langdon* v. *Vermont & Canada R. R. Co.*, 53 Vt. 228.

[7] *Langdon* v. *Vermont & Canada R. R. Co.*, supra. But see also the dissenting opinion of Walker J. in *Humphreys* v. *Allen*, supra.

principle, namely, that of estoppel, the purchaser at the foreclosure sale, having no interest in the trust fund represented by the certificates, cannot contest the validity of their issue, or question the amount for which they were declared to be a lien upon the property. The decree of foreclosure, adjudging the certificates to be a lien in a specified amount, binds equally the purchaser and all persons claiming under him [1]. Where the road has been sold under the decree of foreclosure subject, as is usual, to the lien of the receivers' certificates, the purchaser is concluded. It does not lie in his mouth to urge that the issue was invalid, or in fraud of some bodies' right. He has acquired his title subject to all such liens and priorities as may be allowed by the Court to come in prior to the mortgage indebtedness, and he cannot, after such liens have been established in the regular way in the proceedings incident to foreclosure, dispute their validity [2]. But if the railway is sold to satisfy the certificates, the sale will not divest a mechanic's lien claimed by a creditor for the construction of the road, if he had instituted proceedings to enforce his lien before the appointment of a receiver, and was not made a party to the suit in which the receiver was appointed and in which the property was sold. In such a case the receiver in no way represents the creditor claiming the lien, and the property is therefore to be regarded as having been sold subject to his lien [3].

The Payment or Redemption of the Certificates. Inasmuch as receivers' certificates are acknowledgments of indebtedness rather than promises to pay money, and because they are constituted, by an order of a Court, a lien upon a fund to be ascertained, rather than the personal undertaking either of the railway company or the receiver, they are not in general such commercial obligations as will support an action at law for their enforcement or collection, and it is not usual to bring suits to compel their payment. The order of Court under which they are issued, as a rule, not only makes them a lien on the fund to be derived from the sale of the mortgaged property, but also provides that they are to be paid out of the purchase money [4]. Accordingly the usual practice in seeking their payment is by motion to the Court by whose authority they were issued. This is in general the only way to compel the

[1] *Central National Bank of Boston* v. *Hazard* (U. S. Circ. Ct., Northern District of New York, March, 1887), 1 Ry. & Corp. L. J. 347; *Swann* v. *Wright's Executor*, 110 U. S. 590; *Swann* v. *Clark*, Id. 602. See also *Adams* v. *Barnes*, 17 Mass. 367; *Campbell* v. *Hale*, 16 N. Y. 585, 589; *Horton* v. *Davis*, 26 N. Y. 495; *Freeman* v. *Auld*, 44 N. Y. 50; *Harkinson* v. *Sherman*, 74 N. Y. 88; *Grissler* v. *Powers*, 81 N. Y. 57; Freeman on Judgments, § 162.

[2] *Swann* v. *Wright's Executor*, 110 U. S. 590. [3] *Snow* v. *Winslow*, 54 Iowa, 200.

[4] *Wallace* v. *Loomis*, 97 U. S. 146, 162; *Miltenberger* v. *Logansport R. R. Co.*, 106 U. S. 286, 309; *Union Trust Co.* v. *Illinois Midland Ry. Co.*, 117 U. S. 434, 454.

redemption of receivers' certificates [1]. The holders of these securities must see to it that, in the order distributing the purchase money, a proper provision is incorporated for their redemption; because if once the property is sold and the Court makes a final decree without providing for the payment of the certificates, and the receiver is discharged, there is, in some sort, an end of the matter. The receiver cannot be sued; the Court has no longer either the suit or the property under its control, and is powerless to compel payment of such obligations. In one such case it seems to have been held that the purchaser took the property subject to all claims which might be enforced against the receiver [2]. In any case, as of course, where the fund or property in the hands of the Court is not sufficient in amount to redeem the certificates in full, the holders will be entitled only to *pro rata* shares of the proceeds of the sale [3].

Summary. A receiver's certificate is a non-negotiable instrument —a debenture or evidence of debt—issued, by authority of a Court of Chancery, by a receiver in possession of mortgaged railway property. It may lawfully be issued only to preserve the property from waste or destruction, or to protect the public in the safe and convenient use of the highway, when the current revenues are inadequate. It can lawfully be made a first lien upon the property, in the absence of an enabling provision in the trust deed, only upon the express personal assent of all the holders of the mortgage bonds, and can lawfully be issued only upon due notice and after a hearing, all parties in interest being represented. The issue of such certificates is an exercise of the extraordinary jurisdiction of the Court of Chancery, and is not to be resorted to except under extraordinary and exceptional circumstances, when the interests of all the parties seem imperatively to require it. Neither the bondholders after the regular issue of the certificates, nor the purchaser of the property after final decree, will be heard to challenge the validity of the issue, or to raise a question as to the extent of the lien. Payment of the certificates cannot be enforced in an action at law, but the proper procedure to compel their redemption is by motion to the Court for an order that they be paid out of the proceeds of the sale, or in accordance with the terms of the order under which they were issued.

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[1] *Turner* v. *Peoria & Springfield R. R. Co.*, 95 Ill. 134.

[2] *Farmers' Loan & Trust Co.* v. *Central R. R. Co. of Iowa*, 7 Fed. Rep. 537. But here the Court had in the final decree reserved jurisdiction to enforce as liens upon the property all liabilities incurred by the receiver.

[3] *Turner* v. *Peoria & Springfield R. R. Co.*, 95 Ill. 134.

HINDU LAW IN MADRAS.

J. H. Nelson. A View of the Hindu Law as administered by the High Court at Madras. Madras. Higginbotham & Co. 1877.

J. H. Nelson. A Prospectus of the Scientific Study of the Hindu Law. London: C. Kegan Paul & Co. 1881.

Examination of Mr. Nelson's Views of Hindu Law in a Letter to the Right Hon. Mount Stuart Elphinstone Grant Duff, Governor of Madras, by Mr. Justice Innes, a Judge of the High Court of Madras. Madras. Higginbotham & Co. 1882.

J. H. Nelson. A Letter to Mr. Justice Innes, touching his attack on Nelson's View of Hindu Law. Madras. Higginbotham & Co. 1882.

J. H. Nelson. Indian Usage and Judge-made Law in Madras. London: Kegan Paul, Trench & Co. 1887. 8vo. vi and 386 pp.

A. Barth. Articles in *Revue Critique*. Paris. 29 June, 1878, and 28 August, 1882.

THE above list contains the materials of a discussion which has been carried on in India and in Europe for the last ten years, and which has generated an amount of local heat not usual in merely scientific investigations. In 1877 Mr. Nelson, a District Judge in Madras, undertook to prove that the High Court of Madras was administering justice to the natives of that Presidency upon utterly false principles, and was in fact doing them systematic injustice. That Court was in the habit of administering to those whom it supposed to be Hindus something which it supposed to be Hindu law, as recorded in certain books which it supposed to be authorities upon that law. Mr. Nelson's thesis was that in Southern India there were few, if any, persons properly called Hindus; that there was nothing properly called Hindu law; and that the books referred to were of no authority at all. Some controversialists would have been satisfied with leaving their case there. Mr. Nelson went further. He proceeded to show that even according to the books accepted by the High Court a great number of their rulings were flagrantly wrong. In other words, that in their decisions they habitually assumed false principles, and drew from these principles illogical conclusions. His second work in 1881 was chiefly devoted to strengthening and extending the former proposition. In 1882 a vigorous passage of arms took place between Mr. Justice Innes of the Madras High Court and his subordinate, in which each recorded a number of undoubted hits upon the other. Professor Barth, whose authority as a Sanskrit scholar is of

the highest rank, reviewed each of Mr. Nelson's works with great care, his verdict being that the author had a very good case, which he had made out with great ability, but which he had carried much too far. Mr. Nelson's latest treatise reiterates and enforces both branches of his former argument.

It would be unprofitable to follow Mr. Nelson in his criticism of particular decisions. Probably any barrister in the Temple, with nothing better to do, could offer equally cogent reasons to show that all the recent judgments of the House of Lords were unsound. There must be finality somewhere. The most important rulings combated by our author have received unanimous approval from all the High Courts of India, and have been finally accepted by the Privy Council. The larger questions raised by Mr. Nelson are, however, of the greatest importance, and would repay an examination far wider and deeper than the space at our disposal will allow. They resolve themselves into the following heads: Is there such a thing as Hindu law? Is it to be found in the works generally referred to? Is it applicable at all, or with what limitations, to the natives of Southern India?

Mr. Nelson says broadly (Preface to View, p. iii): 'I venture to think that no such thing as Hindu law has ever existed.' 'No doubt India has had her tribal customs in the shape of *Dharma Sutras* and *Smritis*, as Spain has had her books of customs, generally called Fuerós; but the Digests were mere attempts to construct a scientific *corpus juris* out of rude and inharmonious materials.' In a subsequent passage of the same work (p. 3) he says: 'In speaking here of law I desire to be understood to speak simply and strictly of an aggregate of laws proper, set to men by political superiors, and which are commands that oblige persons to acts or forbearances.' If by this limitation Mr. Nelson merely wishes to convey that in early India there never was anything resembling legislation, he is simply asserting a fact which it would occur to no one to deny. But then his earlier proposition would be as misleading as a statement that no such thing as English law has ever existed, except what is to be found in the Statutes at large. What he really appears to mean is, that there is no such thing as a Hindu Common Law, by which every Hindu is presumptively bound, until he has made out a special custom exempting him from it. Let us see how far this is true.

From a period certainly not later than 2000 years ago up to the seventeenth century we have a continuous succession of Sanskrit works dealing with questions of law. None of these make the slightest pretension to being authoritative Codes. For about 1000 years they are not even law-books. The early treatises of this

class are a sort of Whole Duty of Man. They profess to instruct him in everything which it is important for him to know, and everything which it is proper for him to do. The author gives his views on cosmogony and ethnology, on transmigration of souls and a future world. He lays down precepts for kings, generals, and judges. He describes the various stages of a virtuous life, and the line of conduct suitable for each. What we call criminal law is discussed as a branch of ethics, in which the criminal expiates his guilt by penance; by attending upon cows, or by embracing the red-hot iron image of a woman. Incidentally and scattered at random, we find statements as to what may be termed domestic law. We are told what wives may be married, what sons may be affiliated, when and in what manner the family property may be divided, who are a man's heirs, and the like. Such statements are put forward as pure matters of fact. We are told as to many of them that different practices and different opinions prevail elsewhere. Established usage is admitted to be the supreme and ultimate test. In some of these books details are supplied on points which are untouched in others. In some the statements are conflicting. Gradually the books become fuller and more systematic on matters of law. Narada (about the sixth or seventh century) for the first time produces a mere law treatise, which discloses a highly-organised and artificial state of society. Then commences the era of commentators. Their task was apparently, in Mr. Nelson's words, 'to construct a scientific *corpus juris* out of rude and inharmonious materials.' But it is evident that their real task was to bring the actual usages of their day into harmony with the conflicting dicta of ancient sages. Several distinct currents of opinion on important subjects developed themselves in different regions of India; and we find the writers in each region struggling to make their own opinions square with the early *Sutras*. For instance, the lawyers of Bengal and Benares cite exactly the same texts in support of absolutely contradictory rules of inheritance, partition, and alienation. It is impossible to account for this, except by supposing that they were surrounded by practices for which it was necessary to find some authority in immemorial usage. It is also most important to remark that these commentators were not merely speculative recluses. Many of them were men engaged in government and administration. A king named Cera wrote a treatise on adoption at the end of the fourth century. Apararka, a sovereign who reigned in the Konkan in the twelfth century, wrote a commentary on general law. Madhaviya, who was prime minister to several kings of the Vijayanagara dynasty, wrote the Daya-Vibhaga in the fourteenth century. Pratapa Rudra Deva, a king of Orissa, wrote another elaborate commentary in the

sixteenth century. Why should busy men like these write works on a law which did not exist? The works themselves, differing as they do in many points, all indicate a state of society substantially the same. They all evidence a legal structure, the foundations of which are to be traced in the *Sutras* of a thousand years gone by.

The sequence of commentators of authority continued until the dawnings of British rule. When our judicial system was established, the East India Company announced its determination to administer Hindu law to the Hindus. In order to enable English judges to do so, natives of learning were invited to frame digests of the law by which they considered themselves to be governed. Two such digests were framed in the end of the last century. One, known as Halhed's Gentoo Code, was drawn up at the request of Warren Hastings. Another, known as Jagannatha's, or Colebrooke's Digest, at the instance of Sir William Jones. In each case, the compilers resorted to the writers already indicated, and produced a harmonised repertory of their opinions as representing the living Hindu law. Further, every European Court up to 1863 was provided with its Pundit, or learned native assessor, whom the judge was bound to consult upon points of Hindu law. When they were consulted, they invariably referred to the same series of authorities, and gave opinions which were either in direct conformity with those authorities, or which constituted such developments of or variations from earlier law, as have been accepted as representing existing usage. Finally, at all periods of our rule, the subordinate Courts have been filled by native judges. In later periods, seats on the High Court Bench have been occupied by Hindus of learning and experience, such as Dwarkanath Mitter in Bengal, Nanabhai Haridas in Bombay, and Muthusami Iyer in Madras. All of these have professed to administer Hindu law to Hindu suitors, and millions of persons, and tens of millions of property, have been affected by their decisions. The reports are full of discussions as to the meaning of a particular text; as to whether one system of law or another should be applied; as to whether the law itself should not be superseded by some local or family usage. But I know of no case where it has been suggested that 'Hindu law is a mere phantom of the brain, imagined by Sanskritists without law, and lawyers without Sanskrit' (View, p. 2). Of course the whole thing may be part of one gigantic practical joke, which has lasted upwards of two thousand years, and Mr. Nelson may be the first person who has seen into the humour of it. But at present the weight of authority and reasoning appears to be on the other side.

Assuming then, provisionally, that there is such a thing as Hindu law, the next question is, whether the Madras judges have been

right in the authorities they have resorted to. Hitherto it has been supposed that the leading authority in Southern India was the Mitakshara, and that it was supplemented, and in some instances controlled, by the Smriti Chandrika, the Sarasvati Vilasa, and the works of Madhaviya and Varadaraja. Mr. Nelson says (Prospectus, p. 86): 'I adhere to my belief that it is right to deny for the present all authority to the Mitakshara and kindred works, and to explode the notion of a Madras school of Hindu law; and in the event of its turning out, as I hope and expect, that there is no such thing as an authority upon matters of inheritance and succession for the Madras Province, the future study of Hindu law will be immensely facilitated for South India.' The Mitakshara is Mr. Nelson's favourite aversion. In his Prospectus he advanced a theory that its real date was the seventeenth or eighteenth century, and not the eleventh, to which it has been generally referred. This view was gently brushed aside by M. Barth in the *Revue Critique*, and has not been repeated in his last work. He still, however, denies that it is a work of any legal authority in the Madras Presidency, or apparently anywhere. It is necessary, therefore, to see what the evidence is on behalf of it and of the supplemental works. In dealing with this part of the question, I shall not cite the opinions of judges or text-writers, who merely rely on the statements of their predecessors. I shall only adduce the evidence of those who have a high and independent authority of their own.

Foremost of all such is Mr. Colebrooke. Speaking of the Mitakshara in his preface to the Daya Bhaga, he says: 'The range of its authority and influence is far more extensive than that of Jimuta Vahana's treatise, for it is received in all the schools of Hindu law from Benares to the southern extremity of the Peninsula of India as the chief groundwork of the doctrines which they follow, and as an authority from which they rarely dissent. The works of other eminent writers have concurrently with the Mitakshara considerable weight in the schools of law which have respectively adopted them; as the Smriti Chandrika in the south of India; the Chintamani, Retnakara, and Vivada Chandra at Benares; and the Mayukha among the Mahrattas: but all agree in generally deferring to the authority of the Mitakshara, in frequently appealing to its text, and in rarely, and at the same time modestly, dissenting from its doctrines on particular occasions.' Mr. W. H. MacNaghten, of whom Sir E. Ryan reported to the Privy Council that his authority on a question of law stood higher in Bengal than that of any Pundit, says: 'The Mitakshara, the Smriti Chandrika, the Madhaviya, and the Sarasvati Vilasa, are the works of paramount authority in the

territories dependent on the Government of Madras.' The same statements are made by Sir Thomas Strange, who, though not himself a Sanskrit scholar, sought for and obtained every information procurable from European and native scholars; by Mr. Ellis, a Madras civilian, whose authority is rightly considered by Mr. Nelson as of the very highest rank; by Mr. Borradaile, translator of the Mayukha; by Kristnasawmy Iyer, translator of the Smriti Chandrika, and a native judge in Madras; and by Messrs. West and Bühler, joint editors of the Bombay Digest, who combine with the most exhaustive knowledge of Sanskrit the most exhaustive knowledge of law. Mr. Strange, a Madras civilian, who was Judge of the Sudder and High Courts, and was in constant communication with the Pundits of his Court, says in his Manual of Hindu Law: 'The Mitakshara, or Vijnaneswareyum, is the great authority in the school of Benares, and by consequence in that of Madras, and the work is so associated with that of Manu, the chief founder of the law, that the two are commonly named together, Manu-Vijnaneswareyum, as the embodiment of all law.' Dr. Burnell says: 'All the treatises current in Southern India, however, only amount to five;' that is, the Mitakshara, Smriti Chandrika, Madhaviya, Sarasvati Vilasa, and Varadaraja. He also points out that the Smriti Chandrika, the Madhaviya, and Varadaraja, though seldom naming the Mitakshara, are all based upon it. The Sarasvati Vilasa refers to Vijnaneswara by name in every other page. Dr. Jolly in his Tagore Lectures says: 'Nothing tends better to show the high esteem in which the Mitakshara was held than the fact, that although a commentary itself, it was repeatedly commented on by eminent Pundits.' Finally, for the last century, every Pundit who has been consulted on any point upon which Vijnaneswara has spoken, has, except in Bengal, supported his opinion by a reference to the Mitakshara. Every native pleader has cited it in his argument, and every native judge has relied upon it in his judgment. This seems a pretty strong phalanx of authorities. What has Mr. Nelson to put against it?

First of all he says that Mr. Colebrooke knew nothing of Southern India. He talks of his 'rash guess' as to the authority of the Mitakshara, and suggests that he and Mr. Ellis and others had simply repeated what their Pundits had told them. One is tempted to ask, Why the Pundits should have told them what they did not believe, or why they should have believed anything without foundation? The following are the grave and measured words with which M. Barth replies to this argument. 'Où a-t-il vu que William Jones et Colebrooke croyaient tout ce que leur disaient leurs pandits? Colebrooke surtout, la prudence en personne, que

la critique, depuis plus d'un demi-siècle, a peut-être pris en défaut sur cinq ou six points de détail, tandis qu'elle n'est pas encore parvenue a résoudre la moitié de ses doutes, et dont toutes les publications réunies ne contiennent pas autant d'erreurs matérielles que M. Nelson en a parfois mis dans une douzaine de pages. Je ne puis vraiment pardonner à l'auteur la légèreté avec laquelle il s'est attaqué à cette grande mémoire.'

Then Mr. Nelson says that the natives he met seemed never to have heard of the Mitakshara. This is likely enough. Ask an ordinary English gentleman—say an average Peer or Member of Parliament—what precise value is to be attributed to Fearne's work on Contingent Remainders, or Serjeant Williams' Notes to Saunders, and watch his face while he replies. Even those who are practically acquainted with a subject seldom know the authorities in which the learning upon it is contained. How many bankers have read Byles on Bills? How many shipowners have read Abbott or McLachlan? It would have been an important fact if we could have been told that the Mitakshara or its supplementary works were unknown to any native pleader or judge, or even to the recluses who still live in the *mutts* of Tanjore, Trichinopoly or Ramaiswaram. But this we do not hear.

Then Mr. Nelson says that the Mitakshara cannot be an authority in Southern India, because Vijnaneswara was a follower of the White Veda, whereas most of the Brahmans in Madras are said to be followers of the Black Veda. Supposing the fact to be so, the obvious answer is that which M. Barth makes to a similar objection offered to the authority of Yajnavalkya. Neither the White nor the Black Veda has anything to do with secular law. It would be just as reasonable for English Protestants to reject the legal opinions of Mr. Butler, because he was a Roman Catholic, or of Sir George Jessel, because he was a Jew. Mr. Nelson himself supplies an interesting fact which exactly illustrates the distinction. 'Recently I was informed by a learned Hindu that when the Brahmans of South India worship their books at a certain yearly festival, they are careful to exclude from their list of objects of worship the works ascribed to Gautama, though they habitually regard that name as the name of a great sage and teacher, and read *Gautama* works. They will not venerate the name, though they are willing to recognise and profit by the intellectual power of the person supposed to have borne it. It is possible that the Mitakshara may be used and regarded the same way' (Prospectus, p. 84).

Mr. Nelson relies on the opinion of Mr. V. N. Mandlik, who says in a recent work: 'Vijnaneswara was a very learned writer, and he wrote an excellent commentary on the Yajnavalkya Smriti. But

apart from that there was nothing very special about it. And as a matter of fact, it is less consulted than the works of Hemadri, Madhavya, and the Bhattas.' This dictum is controverted by Dr. Bühler, who points to the 'contrary views of the responsible Court Shastries, and of many excellent native authorities, as well as to the respectful treatment awarded to Vijnaneswara in the best native compilations of the sixteenth and seventeenth centuries.' He adds, 'His remark that the works of Kamalakara, Madhavya, Narayana, and other Bhattas are more frequently consulted than the Mitakshara is true. But the reason of this is, that under British rule, with its organised judiciary, Pundits are consulted by the people not on civil law, but on vows, penances, ceremonies, and other matters of the religious law, on which subject the books named by him give fuller information than the Mitakshara.' This is quite in accordance with the language of Mr. V. N. Mandlik himself, in a passage which precedes that quoted by Mr. Nelson. '*Dharma* in the case of the Hindus means pre-eminently usage or custom. We accordingly find the twelve Mayukhas and the Mitakshara to be two out of the many treatises consulted at Poona as treating of such customs. In Khandesh, amongst the works on Vyavahara, they are two out of the five works named at the time of Mr. Steele. The analysis of the Samskara Kaustubha and Nirnaya Sindhu shows the same thing. So does the list made up from the current replies of the Shastries.'

In regard to the Smriti Chandrika, Mr. Nelson falls into a curious error. He says (Indian Usage, p. 366): 'Of another work to which, I regret to see, the Madras High Court is beginning to ascribe undue prominence, namely the Smriti Chandrika, Mr. Mandlik has something very important to tell. In the first place, he declares that this work is not by the same author as the Dattaka Chandrika. And second, he tells us that it is, as it professes to be, the work of Bhatta Kubera, a Bengal author.' It is quite true that the Dattaka Chandrika and the Smriti Chandrika are by different authors. But if Mr. Nelson had read the passage to which he refers with the slightest attention, he would have seen that the treatise which professes to be, and is, the work of Kubera Bhatta, is not the Smriti Chandrika but the Dattaka Chandrika, a monograph on adoption. What is odder still is, that in 1881 (Prospectus, p. 82, note 4) Mr. Nelson understood the matter correctly.

So far then as our author has affected the case, it would seem that those who have to administer Hindu law to Hindus in Southern India may safely resort to the works which every Sanskrit scholar, from Colebrooke to Burnell, has stated to be authorities in Madras. But then comes the last and most important

question; Is Hindu law applicable at all, or with what limitations, to the natives of Southern India? Upon this point Mr. Nelson has a great deal to say that is really interesting and valuable, and although his opinions are pressed too far they deserve the greatest attention. He points out that the Sanskrit treatises from which we derive our ideas of Hindu law were written by Aryans for Aryans; by Brahmans for Brahmans, or at all events, for members of the three superior classes; that the great mass of the inhabitants of Southern India are not Aryans; that it is very doubtful whether there are among them many genuine Brahmans, and quite certain that there are neither Kshatriyas nor Vaisyas; that a large proportion of the Tamil population are not Hindus by religion, and that of those who profess the Hindu religion, the majority have never heard of the laws which are supposed to bind them. Further, he points out that even the Sanskrit lawyers put custom above precept, and he asserts that the inhabitants of Southern India are mainly governed by customs of their own, which have nothing to do with the supposed Hindu law.

The greater part of all this is true beyond dispute. In some respects I should be disposed to go even further than Mr. Nelson. I doubt whether the Sanskrit treatises have ever had any binding force even upon the purest Brahmans, except as evidence of their customary law. It is quite certain that wherever the Brahmans have different customs, as for instance in Northern and Western India, the customs over-rule the treatises. I do not for a moment imagine that the Tamils of Madura or Tinnevelly are bound by anything contained in the Mitakshara or Smriti Chandrika, merely because it is contained in those books. Where such inhabitants worship Vishnu or Siva the fact is very important, but merely as rendering it probable that their customs are similar to those recorded in such works. Where they are shown to worship snakes or devils the fact is again of very great importance, as removing any such *primâ facie* probability. But in every case the same questions arise. First, Are their customs similar to those recorded in what are called works of authority in Southern India? Secondly, —and this is a point to which Mr. Nelson's attention appears not to have been directed—Are they upon many points absolutely without any customs, but willing, when occasion arises, to accept those ready made for them by Hindu law?

Before attempting to answer these questions, it is material to point out how very limited is the surface of law in dispute. As regards many matters, such as tenures of land, criminal law, and judicial procedure, the Hindus never were governed by Sanskrit law. All these matters, as well as many others, such as the law of

real property, the law of contracts and the law of evidence, are now regulated by express statutes. The whole law of torts has always, since the commencement of British rule, been dealt with on European principles. Hindu law is co-extensive with family law. This again resolves itself into three great heads. First, marriage and adoption. Second, succession and inheritance. Third, the entire mass of law arising from the fact that family property is generally held by all its members jointly. Under this head come the rights and liabilities of the members *inter se*, and the law of partition. Upon all these points the Sanskrit works give rules more or less in detail—often singularly meagre. The great mass of jurisprudence which has sprung up in our Courts is merely the result of those developments which must necessarily arise from the systematic application of certain rudimentary principles to the varying circumstances and growing complications of civilised and advancing life. The decisions of our Courts may be legitimate deductions from the Sanskrit law-books, but undoubtedly they lay down as law a number of rules which are not to be found in the Sanskrit law-books, and were probably never dreamt of by their authors. The same thing of course happens every day in the Courts of Westminster.

Is there, then, anything in the facts of everyday life among the non-Brahman population to lead us to suppose that the usages indicated in the Sanskrit law-books were dissimilar from their family customs, or incapable of being assimilated by them? As regards Northern and Western India we have an ample supply of evidence, collected by the revenue and judicial departments. Enquiries of the most careful character in the Panjab and Oudh have disclosed a system of family law which is substantially the same as what we call Mitakshara law, but free of all religious principles or religious developments. The joint family system is the same. The rules of inheritance are the same, although in some places the principle of agnation, which distinguishes Mitakshara law from Bengal law, is carried out to the extent of excluding widows, daughters, and their sons. The law of adoption is the same, though freed from all restrictions based on religious principles. Similar investigations in the Bombay Presidency have brought to light exactly a similar resemblance, except that the inheritance of females is treated with the greatest indulgence instead of disfavour. Along the coast of Canara and Malabar a totally different family system exists, absolutely irreconcilable with all that is called Hindu law. The importance of this to our present enquiry lies in the fact, that where an undoubted difference of law exists, our Courts have found no difficulty in ascertaining and administering it. For the

remainder of Southern India the materials are unfortunately very scanty. No official enquiries similar to those in Northern and Western India have ever been made for the Madras Presidency. We are left for our knowledge of native customs to the records of our Courts, and to such scattered hints as may be derived from other sources. In 1707 the Dutch Government in Ceylon made a collection of the customs of the Tamil inhabitants of that island. These disclose a family system which, in its general outlines, corresponds with that at present attributed to the Tamils of Southern India. We find a joint family with a right of partition after the father's death. We find a law of adoption which singularly resembles that in force in Mithila. We find a law of inheritance not very different from that of the Mitakshara. The Abbé Dubois, who said that he could not discover any native law-books in Southern India, gives an account of the law of adoption which is perfectly accurate at the present time. Some customs differing from those of Sanskrit law, such as divorce and re-marriage of widows, have been repeatedly proved in and accepted by our Courts. It is remarkable that the numerous native customs which are set out in Mr. Nelson's Madura Manual, and in the Madras Census report, mainly refer to the law of marriage. As to it, our Courts have long since laid down that they would accept as a valid marriage anything, not *contra bonos mores*, which was considered valid in the district where it took place. In recent years modes of adoption, varying from Sanskrit strictness, but the same as those recognised as valid in the North and West of India, have been proved and accepted in Madras. Formerly, no doubt, the High Court set its face against such customs. It is largely due to Mr. Nelson's own efforts that they are now dealt with in a more indulgent spirit. But if we ask whether there is any evidence that the natives of Southern India possess a family system wholly unlike that of the Mitakshara law, and incapable of being regulated by it, the answer must be that there is no such evidence. Mr. Nelson admits (Prospectus, p. 148) that the merchant castes, and perhaps a few agricultural and other families, live after the manner of Brahmans. I have had a very large experience of the Zemindars, or landed nobles, and I can testify to the same thing, as regards family law. Mr. Nelson says that the rest of the population have different customs, but he does not tell us what the customs are, except as regards 'the looseness of the marriage tie and the frequency of concubinage.' If we find that those classes who have property adopt Hindu law, is it not the obvious inference, either that that law agrees with their own customs, or that they accept it in the absence of any special customs of their own? The great mass of the popu-

lation have no property to divide, no property to transmit, no property to which to adopt. They know no more of Hindu, or any other law, than a crossing sweeper knows of the statute of distributions. But the moment they have any property which has to be administered by law, we find that Hindu law is that which is tacitly accepted. I have often been consulted in the earliest stage of a litigation, when it was necessary to settle the form of the suit, or the form of the defence. I have sat for hours in presence of my client, surrounded by the acutest of his friends, and the most subtle of pleaders. We have discussed every bearing of the law upon the facts (or fictions) of the case. But, however disadvantageous the law might be, I have never once heard it suggested that any different rule should be applied. The obvious conclusion seems to be that Hindu law, however foreign it may be in theory, was founded upon a state of the family substantially the same as that which now exists. It comes to the natives of Southern India, recommended by the example of the wealthy and the influential, the learned and the official classes, and it is willingly accepted as governing each new case, when no custom to the contrary is in force. Where such a custom exists, they have no hesitation in putting it forward, and in later years, at all events, they have found the Courts willing to accept it if proved.

Upon the third point, therefore, it seems to us that Mr. Nelson has performed an inestimable service in putting the authority of the Sanskrit works upon its true basis, as merely evidence of custom, and in leading the Courts to lend a ready and favourable hearing to any allegation of conflicting customs. But we also think that he has shown that the most influential classes in Madras are willing to accept the Hindu law; that he has not shown that any class refuses to accept it, and that he has offered no evidence of the existence anywhere of any customary family law which could take its place.

Mr. Nelson states fifteen false principles on which the Madras High Court has been in the habit of acting. In dealing with these, the difficulty one finds is, that Mr. Nelson's mind seems to vibrate between a state of slavish submission to Sanskrit law, and a state of absolute revolt against its authority. His fifteenth false principle is that 'a Hindu family may be at one and the same time divided and undivided.' He argues against this on the strength of an old priestly maxim, that all wealth is to be applied for the religious benefit of the family. It may be safely asserted that this maxim never had, and certainly has not now, any greater practical efficacy than the Christian precept, that if a man takes your cloak, you should give him your coat also. His fifth false principle is that

'a son or a grandson may compel a division of ancestral property against the will of his father or grandfather.' Here his argument is based upon a long series of very early Sanskrit texts, which undoubtedly tend to make out his proposition. But then his fourth false principle is 'that a state of union is the normal and proper state of a Hindu family, and therefore non-division should in all cases be presumed until the contrary is shown.' He seems unconscious that the very same texts which make out the falsity of the fifth principle establish the truth of the fourth. Both may be true, or only one may be true, but both cannot be false. If Mr. Nelson is right, wherever a family consists of a male ancestor and his lineal descendants, the family property is not only undivided, but indivisible, unless by consent of the ancestor. When the male ancestor dies, the property will pass into the hands of a number of brothers, nephews, etc., and their sons. Mr. Nelson cannot dispute that in their hands also the property would continue undivided, until some distinct act of partition takes place. But this is all that is asserted by the fourth principle which Mr. Nelson boldly asserts to be 'wholly erroneous.'

Mr. Nelson proposes two remedies for the uncertain state of things which exists. First, a general enactment which 'should recognise and proclaim the general right of the Indian to consult his own inclination in all matters of marriage, adoption, alienation, testation, and the like.' The Act is to go on to provide that 'in default of clear and positive proof to the contrary, every act or forbearance, which is challenged as being contrary to Hindu law or to some custom of the caste, shall be deemed, as between the parties, and for the purposes of the particular suit, to be in all respects right and valid, all rules contained in the Mitakshara and other books notwithstanding.' If one Indian selects one rule of law, and another Indian selects an opposite rule, it is difficult to see how either rule can be declared illegal, consistently with the first clause. Another remedy is to appoint a commission to enquire into all existing customs. If such a commission was carried out with care, and with the *perita interrogatio* of really skilled investigators, it might produce very valuable and interesting results. It would probably elicit a number of curious customs as to marriage and divorce. It would probably establish a number of local variations on the law of adoption, and possibly of inheritance, especially as regards the rights of widows. But we should anticipate that the leading result would be to establish that the minds of the vast majority of Hindus were an absolute blank as to all law, and that whenever occasion required, they accepted their law implicitly from the village astrologer or accountant, or from the nearest

native pleader. Mr. Nelson mentions a case before himself, in which, during the progress of the suit, it appeared that one of the parties was a Jain. Upon this he turned to the native pleader, and asked what was to be done now? The pleader answered vaguely, that he supposed a Jain was a sort of Hindu, and should have Hindu law applied to him. The litigant was then questioned as to what law he wished to be applied to himself. So far from rising to the occasion with any settled views on jurisprudence, he replied cautiously, 'What master please.' Mr. Nelson goes on to say that he supposes he administered Hindu law to the case, and no doubt it was the wisest thing he could have done. The law which is accepted by the local Zemindar or banker, by the officials of the Cutcherry or the Court, will be always satisfactory to the shopkeeper or the ryot.

JOHN D. MAYNE.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

On Searches: containing a concise Treatise on the Law of Judgments, Crown Debts, Executions, Lis pendens, Bankruptcy, Insolvency, Annuities, and Statutory Charges, as affecting land. By HOWARD WARBURTON ELPHINSTONE and JAMES WILLIAM CLARK. London: W. Maxwell & Son. 1887. 8vo. 200 pp.

THE meagre list of errata inserted into this volume, which comprises all, and perhaps more than all, that our researches would have detected, sufficiently shows the high degree of accuracy that has been attained in the performance of a very laborious and somewhat thankless, though useful, task. The trouble of rummaging out and putting together the matter composing this small volume must have been so great that it demands a cordial word of recognition from those who are capable of measuring its extent; especially in a case where not everyone possesses this capability, and the merits of the work are not of a kind that conspicuously attract the public attention. Yet at the present time, when the benefits of 'registration' are in some danger of being puffed into the position of a universal quack-medicine, it is highly instructive to see what has been previously effected in this department; and the present work brings together more information bearing upon the subject than has ever before been collected into a single book.

Two points appear to be particularly worthy of attention. The reader is aware that the thorough-going advocates of 'registration of titles' display an extraordinary solicitude for the safety of purchasers and mortgagees. This anxiety, which professes to be founded upon the apparent ease with which deeds and assurances might be fraudulently suppressed under the present practice, is wholly superfluous, and probably is not in all cases wholly sincere. It might at all events find for itself a different outlet. Parliament has for many years been employed in multiplying and elaborating another machinery of fraud; and if its wisdom has not succeeded in making titles generally unsafe, we must rather thank the prevalent standard of honour and good faith among the public than the foresight of the Legislature. The policy of permitting the creation of statutory charges has been carried to a length which has now made fraud in a good many cases about as easy as lying. Not to mention registered charges created under public Acts, which must be presumed to be generally known and guarded against, there exist sundry local Acts for similar purposes, which nobody (practically speaking) knows anything about; and even—the fact will seem hardly credible, but it is nevertheless true—there exist various local Acts enabling statutory charges to be created, which have priority before all other charges, but *are not registered and could not possibly be discovered, except by accident, if a vendor should think fit to conceal them.* Messrs. Elphinstone and Clark considerately give a list (pp. 121–124) of such of these Acts as are known to them; remarking that it would be almost impossible to make the list complete, and that they have not attempted to do so.

The other point above referred to teaches the lesson, that attempts to make everything quite easy and no trouble at all, are usually attended by unforeseen dangers. The system of official searches introduced by the Conveyancing Act, 1882, no doubt conduces much to what is called 'convenience;' but the reader of the work now under review will find (pp. 166–168) that, as usual, ease is obtained by some sacrifice of efficiency. The concluding passage on this subject, which has much in it that is applicable to searches in general, is so remarkable that we here present it in full:—'The practical conclusion is, that an official search is not quite as safe as a search made by a solicitor in person, and that no solicitor can ever feel certain, however carefully he may have made the necessary searches, that he has found everything entered up against the vendor—unless, indeed, he adopts the ruinously expensive plan of noting every entry made against persons bearing the same name as the vendor, whatever may be their descriptions, and of then satisfying himself that none of these entries apply to the vendor—a course which is clearly impracticable. We may add that, even if he were timid enough to follow this course, he would still not be absolutely safe; the vendor might have changed his name prior to his purchase-deed, a fact of which there would be no trace on the abstract, and something might have been entered up against him in his previous name' (p. 168). Of searches, as of all earthly things, there cometh a satiety at the last.

H. W. Challis.

The Anglo-Indian Codes. Edited by Whitley Stokes, D.C.L. Vol. I. Substantive Law. Oxford: Clarendon Press. 1887. 8vo. xxxii and 1034 pp.

It may almost be said that to produce this work was a duty which Mr. Whitley Stokes owed to English and Indian lawyers, and for it we feel sure that they will feel sincerely grateful. Mr. Whitley Stokes has become so widely known as a Celtic scholar that the younger generation, had they not been reminded by the present work, might have forgotten that thirty years ago the late Lord Cairns had marked out Mr. Stokes as one of his most distinguished pupils, and that twenty-five years ago he began at Madras that close and accurate study of the Indian law which enabled him to perform so ably the duties, first of Administrator-General of the province of Madras, afterwards of Secretary to the Legislative Council of the Governor-General of India, and lastly of Law Member of the Governor-General's Council.

Mr. Whitley Stokes is a man of strong faith as well as of marked ability. He believes in Codification, and he sets forth its history and its achievements in India in the general introduction to this volume. He is too modest to affirm positively that work in which he has himself had so large a share has been successful. But he complains (p. xx) that since he left India it has not been proceeded with, and that 'to all appearances the Indian Government has at last yielded to influences resembling those which in India pigeon-holed the Penal Code for more than twenty years, and which here in England deprive the nation of the priceless boon of a body of substantive law not only wise, but clear, compact, and easily obtainable.'

Mr. Whitley Stokes does not explain what he conceives to be the influences here alluded to, and the question whether the great work of Codification is proceeding too fast or too slow is always a very difficult one. It could not be discussed in a preface, nor can we discuss it here. But we should hesitate before we condemn the Government of India for proceeding

with great caution in this matter. An attempt at Codification which is a failure is not mere waste of time; it is a standing impediment to progress. No Codification can be absolutely final, because society itself progresses; but it ought to be final in the sense that the Code of Napoleon has been final, that is, it should furnish the framework and foundation of the law for at least several generations. But what does Mr. Stokes himself say of one portion of the Code as already framed for India? He says of the Contract Act (p. 534): 'Its provisions are so incomplete and sometimes so inaccurately worded that the time seems to have come for repealing the Act and re-enacting it with the amendments in arrangement, wording, and substance, suggested by the cases decided upon it during the last fourteen years.' This renovation may be necessary, but it surely would be in itself a great disaster. Unless a Code can be so drawn as to be at least susceptible of the necessary amendment without being completely recast after so short a period as fourteen years, Codification is a very doubtful benefit. And when we consider who the lawyers were who drew up and revised the Contract Act, we shall feel all the less inclined to be hasty in predicting certain success to any efforts of a similar kind.

For myself I am much inclined to believe that if ever good work is to be done in India, or in England, in the way of Codification, it will only be done by proceeding very slowly, by codifying here and there a small portion of the law, by drafting codes and leaving them unpassed in order that they may be criticised, and twenty years may not be at all too long for such a purpose. This is something like what the Indian Government seems to be doing. And if caution, and not indolence or apathy, is the explanation of their slowness of procedure, I should not feel disposed to condemn them.

In the meantime the greatest service is rendered to the cause of Codification by such a work as that of Mr. Stokes. The book abounds with useful criticisms courteously and temperately expressed, of which several good examples will be found in the introduction and notes to the Negotiable Instruments Act. Many of these will doubtless be incorporated into the Acts by amendment, and as some of the Acts have not come into full use at present amendment is the less objectionable.

But it is for the practitioner that the work under review was chiefly intended, and it is to him, no doubt, that it will be most useful. The notes have evidently been written with very great care, and the author has contrived to give in them the maximum of information in the minimum of space. It is no easy thing to write useful notes to an Act of the Legislature when space is so limited. Not a word must be wasted. Not even a letter in those references which occur so frequently. And, though everything must be closely packed, it must still be so clear that those who run may read. Having examined with some care the notes to the Penal Code and to the Contract Act, I can say with confidence that the practitioner will find them most useful. Too much is not attempted. A few terse sentences give the pith of the decisions, and the references give ample information where further light can be obtained.

This volume is called by Mr. Stokes 'Substantive Law,' and contains the Penal Code, the Succession Act, the General Clauses Act, and the Acts relating respectively to Contracts, Negotiable Instruments, Transfer of Property, Trusts, Easements, and Specific Relief. A second volume is promised, which is to deal with 'Adjective Law,' and which will contain the Code of Criminal Procedure, the Code of Civil Procedure, the Evidence Act, and the Limitation Act. W. M.

Handbuch des Völkerrechts, auf Grundlage Europäischer Staatspraxis, unter Mitwirkung von, &c., herausgegeben von Dr. FRANZ VON HOLTZENDORFF, Professor der Rechte. Berlin: Carl Habel. 1887. 8vo. Zweiter Band, xii and 671 pp.; Dritter Band, xv and 797 pp.

WE have already welcomed the first volume of this work[1]. The second and third volumes were to have followed in 1886, but one is not surprised, after glancing through their pages, that the date of their appearance could not be predicted with astronomical accuracy. They are storehouses of methodised learning, and cover the various departments of the subject with a completeness which does credit to Professor von Holtzendorff's power of organising the independent labours of his staff of distinguished contributors.

Vol. II is entitled, perhaps not very happily, 'The International Constitution and Basis of the external relations of States.' It deals successively with the following topics: The State as an international person; its absolute rights and duties; constitutional and administrative systems in their international aspect (Prof. von Holtzendorff); the international position of the papacy (Prof. Geffcken); the territory of the State (Prof. von Holtzendorff); rivers and river-navigation (Dr. Caratheodori); the sea and commerce (Dr. Stoerk); slave-trade and piracy (Dr. Gareis); subjects and aliens (Dr. Stoerk). It is refreshing to find no chapter upon the so-called 'Private International Law,' nor even an indication of the position which one feared to find assigned to it. The most important articles in this volume are those upon State territory, upon rivers, and upon the sea.

In Vol. III, entitled 'Treaties and International Magistracies,' the general characteristics of treaties are described by Dr. Gessner. Dr. Geffcken writes upon treaties of guarantee and of confederation. Treaties as to posts and telegraphs, and as to literary artistic and industrial property, are discussed by Prof. Dambach. Dr. von Melle deals with treaties of commerce and navigation, and Prof. Meili with railway conventions. Prof. Lammasch's account of treaties of extradition and for judicial assistance is in itself a substantial work of 240 pages. The remainder of the volume is occupied by the essays of Dr. Geffcken upon Embassy, and of Prof. von Bulmerincq upon Consuls. The latter essay contains detailed information upon the consular regulations of various countries which it would be difficult to find elsewhere. In a work written by many hands it can hardly fail to happen that a detail should here and there be lost sight of. We have, for instance, looked in vain for any mention of the conventions by which attempts have been made to limit the rigour of warfare. This topic has however very probably been reserved for the fourth and concluding volume of this valuable work, which will deal with international disputes, war, and neutrality.

T. E. H.

Commentaries on Equity Jurisprudence as administered in England and America. By JOSEPH STORY, LL.D., etc. Thirteenth Edition. By MELVILLE M. BIGELOW. London. 1886. 2 vols. cxiii and 698, 947 pp.

Leading Cases in Modern Equity. By THOMAS BRETT. London. 1887. lix and 349 pp.

IN this edition of Story's Equity Jurisprudence, Mr. Bigelow professes to give us the original text and notes, as they appear in the fourth edition,

[1] L. Q. R. ii. p. 84.

published in 1846, which was the last one to receive the author's revision. We mistrust the power of any editor to edit the work in such a way as to make it a substitute for the books consulted in everyday practice by the modern practitioner. We had occasion to notice Mr. Grigsby's attempt in that direction two years ago, with a result which we thought unsatisfactory. Story must henceforth be considered as a work more interesting to the historical student than useful to modern English barristers. We congratulate Mr. Bigelow on having recognised the real value of the book. When we want to know what Story held on some question of the fundamental principles of Equity, we can now find it in Mr. Bigelow's edition; when we require to know how those principles have been elaborated in detail in modern times, we should not refer to any edition of Story whatever.

Mr. Brett's book, as its title implies, is intended to serve a totally different purpose. We highly approve of his idea, and consider that such a work was decidedly wanted. But we are compelled to say that in our opinion it might have been more satisfactorily executed. Mr. Brett does not follow the examples set by White and Tudor and Smith of printing his leading cases *in extenso*. He only gives us the barest outline of them. Now if this is due to the proprietors of the copyright of the Law Reports, we think the profession has a serious cause of complaint against them. They have the rights of other copyright-owners no doubt, but they ought not in our opinion to use them as other copyright owners. No sale, however large, of such a book as Mr. Brett's can possibly injure the sale of the Law Reports, and subject to guarding against any danger of that kind, we think that they have no business to exercise their rights against English lawyers, who are in effect their *cestuis que trust*. We do not of course mean to imply that they are responsible for this blot on Mr. Brett's work, for we do not know whether he ever applied to them for their permission to print *in extenso*, and we do know that Mr. Finch has reprinted many cases from the Law Reports, presumably with permission, in his excellent selection of cases on Contract. If Mr. Brett did not apply for the like permission, then we should think he had made a great mistake. Take for instance the case of *Adams* v. *Angell*, 5 Ch. D. 634, which Mr. Brett selects as his leading case on the subject of merger in equity. He gives us only a summary in 14 lines, adding in his note (p. 51), 'The general principles on which the Courts of Equity have proceeded with regard to the question whether charges which have been paid off are to be considered as extinguished, are very fully stated in the judgment in the leading case.' Surely it ought to have been printed *in extenso*. At p. 135, Mr. Brett wrongly, though in common with others, states the principle of *Walsh* v. *Lonsdale*, 21 Ch. D. 9, as follows: 'Since the Judicature Acts, a tenant holding under an agreement for a lease, of which specific performance would be decreed, stands in precisely the same position as if the lease had been executed.' All it really decided was that the tenant in such a case could not complain of being treated by his landlord as if the lease had been executed. On p. 138 Mr. Brett is not accurate in his statement of the principle of *Tulk* v. *Moxhay*, 2 Phill. 774, not having noticed that the injunction in that case was granted only in respect of negative covenants. No doubt *Tulk* v. *Moxhay* has been said to go further; but Mr. Brett should not have stated the principle at secondhand.

Mr. Brett does not in our opinion always stick closely enough to his point, but allows himself to wander off into other matters which have nothing to do with the principle he is illustrating. See for instance his digressions about taking a cheque for the deposit on a sale by auction, which have nothing whatever to do with the remedies of a mortgagee since the Judicature Acts.

At p. 83 the word 'not' is inserted in a quotation, and makes nonsense of the passage quoted. On the whole, we cannot think the book quite worthy of Mr. Clarke's *collaborateur*.

Principles of the Law of Personal Property, intended for the use of Students in Conveyancing. By the late JOSHUA WILLIAMS. The thirteenth edition. By his son, T. CYPRIAN WILLIAMS. London: H. Sweet & Sons. 1887. 8vo. lxiv and 661 pp.

The Modern Law of Personal Property. By LOUIS ARTHUR GOODEVE. London: W. Maxwell & Son. La. 8vo. lviii and 384 pp.

A NEW edition of the late Mr. Joshua Williams's well-tried book is confronted this year with a new rival. Experience must settle which of them shall prevail, or how far there is room for both. Our own impression is that Mr. Goodeve's work will be found easier by most students on a first reading, but that Mr. Williams's will be more instructive and useful in the long run to a man who is willing to take pains. The practice of giving extracts at large from judgments, statutes, and text-books of reputed authority is in itself not otherwise than laudable as to the two former items, but it is somewhat abused by Mr. Goodeve. It violates all sense of proportion to set out the provisions of the Tippling Act and the Act of Charles II against Sunday trading, of which the latter has no effect and the former next to none on any right of property as distinguished from contract, in a treatise on the law of personal property in general. And yet there are large omissions of weightier matters in the book. Whether by design or by accident, Mr. Goodeve has nothing to say of the acquirement of property in chattels by occupation or 'reduction into possession' of things not previously existing or possessed as chattels. We look in vain for *Blades* v. *Higgs* in his table of cases. Neither has Mr. Goodeve anything to tell us about trover. There are three whole chapters on the enforcement of debts (such is the oddly-worded heading), but we can find nothing on the enforcement of rights of property and possession. It is true that on the head of trover Joshua Williams is hardly satisfying. An intelligent student reading his few pages thereon might well say: 'This learned author tells me that conversion is a kind of trespass; why then was not an action of trespass the proper remedy?' and he would certainly have to go farther afield for an answer. But Joshua Williams might have replied by pointing to his title-page; he professed only to explain such matters as a conveyancer should have present to his mind; and the full theory of trover, whether in its earlier forms or in the modern exposition delivered in *Hollins* v. *Fowler*, is hardly among these. The scope of Mr. Goodeve's book is not thus limited on the face of it. What Mr. Goodeve does state appears, on a cursory examination, to be generally accurate; but he repeats twice over the old mistake of saying that the law presumes consideration in the case of a promise by deed. We thought it was by this time common learning that (subject to a few particular exceptions) the law does not require any consideration at all for a promise under seal, and never did. Mr. Williams gives the correct doctrine.

A wider question raised by these books is how far it may be desirable, or how long it may remain possible, to compress into one volume a general view of many distinct branches of the law of which almost all require, and most have received, separate exposition. The law of Real Property is more sharply marked off from the rest of the law than any other branch, except perhaps criminal law. What is called the law of Personal Property is a

collection of heterogeneous topics of very different degrees of importance and general interest; some things which every lawyer must know, some which a good lawyer ought to know, and some which no lawyer will trouble himself to know till the moment when they are wanted. Certainly a general view of the law of ownership and real rights should have its place in a systematic account of the Common Law as a whole. A volume on 'Personal Property' is however in our opinion too much for this, as it is evidently too little to cover the ground for practical purposes. But this need not prevent such volumes from being useful in various ways for the present and for some time to come. We should add that Mr. Cyprian Williams's editorial work appears to have been thoroughly performed. He has not merely posted up his father's book with recent authorities, but has revised it in the light of modern jurisprudence so far as was possible without destroying its identity.

A Digest of the law of Libel and Slander, etc. By W. Blake Odgers. Second Edition. London: Stevens & Sons. 1887. 8vo. lxxii and 803 pp.

Mr. Blake Odgers may be congratulated not only on his work having been appreciated by the profession, but on his treatment of the subject having been justified in most points by the decisions of the last six years. Thus he ventured in his first edition to discard the fiction of 'implied malice;' and this view has now virtually been approved by the House of Lords in *Capital and Counties Bank* v. *Henty*, and may be said to be finally accepted. A good deal of reconsideration is given to the subject of blasphemous libel, on which Mr. Odgers adopts the exposition of the modern law given by Lord Coleridge in *R.* v. *Ramsey and Foote*. He perhaps underrates the extent to which the law has really varied in the hands of different judges guided by different theories. But for all practical purposes his conclusion seems right. In the case of known and certain offences, omission to prosecute offenders, or failure to prosecute them to conviction, is merely irrelevant in law. But where the definition of the offence is itself in dispute, the practical interpretation of uniform experience must have weight. Now there does not appear to be any example of a writer having been successfully prosecuted for arguing against Christianity, or opinions commonly received as necessary to the Christian religion, in decent and temperate language. Woolston's case is about the strongest, and it is clear that the manner of his discourses rather than the matter was the real ground of offence. Contemporaneously with the very dicta relied on for the harsher doctrine, the eighteenth-century school of deists published their arguments without being interfered with by the law. Attacks on the Church of England which nowadays would be held to fall well within the limits of fair public discussion have once or twice been punished, but it appears from the language then held by the judges that they were expressly punished not as blasphemy but as sedition.

Mr. Odgers comments with decided disapproval on the practice of restraining the publication of libels by injunction which has grown up under the Judicature Acts. It certainly involves a rather startling proposition in the history of the law, namely that for twenty years before the Judicature Acts the Courts of common law had wider powers of granting injunctions than the Court of Chancery, but never became aware of their existence. And Mr. Odgers maintains against the Court of Appeal that the jurisdiction does not really exist, and the assumption of it 'is an unconstitutional

innovation.' We confess that we cannot muster any great sympathy for the constitutional as distinct from the legal branch of his argument.

It is a less arduous task of criticism to expose the weak points of the Newspaper Libel and Registration Act, 1881, an enactment of doubtful policy and not doubtful bad workmanship. Mr. Odgers does this with the necessary and reasonable amount of force, and not without a sense of humour.

Patents Conveyancing: being a collection of Precedents in Conveyancing in relation to Letters Patent for Inventions. With Dissertations and Notes, etc. By ROBERT MORRIS. London: Stevens & Sons. Royal 8vo. 443 pp.

THERE is great need for a collection of good precedents within the scope of the above title; and the present work appears to supply very fairly this requirement. Of conveyancing precedents, until they have been tested by long use in actual practice, it is difficult to form an adequate estimate of merit; but it may be safely affirmed of those in the present work that they are of a practical character, and the outcome of actual experience. The chapter on Licences and the precedents comprised with it, extending in all to 109 pages, form the most valuable part of the work:—the collection of special clauses for licences (52 in number) forming a distinct feature. The part relating to agreements might, we think, be advantageously extended; and, in a work intended to have a circulation beyond the legal profession, this should be made a leading feature. For this purpose the stipulations relating to foreign and particularly to American patents should be more fully worked out. The arbitration clause, which is only adopted in precedents 2 and 14, might with advantage be inserted in several others; and a greater variety of precedents might usefully be given. For instance, a precedent might be supplied for an agreement, giving the option of purchase to the owner of a manufactory, in consideration of facilities given to the inventor to work out and perfect his invention on the premises; the option to be declared within a certain date after the complete specification. Doubtless many other varieties will suggest themselves to the author by the time the work reaches a second edition.

Les obligations en droit égyptien. Par EUGÈNE REVILLOUT. Paris: Ernest Leroux. 1886. lxxxiii and 531 pp.

IN this volume the author continues his remarkable inquiries on the laws and juridical institutions of ancient Egypt. In the first volume, already noticed in this REVIEW (Jan. 1886), M. Revillout dealt with Civil Status. He now treats of Contract, including loans, hiring, and pawns. In an appendix, comprising half the volume, he gives a full account of the law of Chaldea from the 23rd to the 6th century before the Christian era, comprising civil status, banking, trade debts, and guarantees. In this ancient but highly developed law, the author finds the origin of the later law of Rome. 'Even in the law of the Twelve Tables, all that is worthy of the name of law is imitation of Egyptian law' (p. lxxxi). 'There is next to nothing Roman,' he says, 'in what is thought to be Roman law, except certain subtleties, unnatural institutions such as the organisation of the family, of society, [*sic*] the right which subsisted to the time of Hadrian to become by a single year's *mala fide* possession owner of a succession seized with the knowledge that there was no manner of title to it; the right which

subsisted still longer of selling a thing given in trust after having fraudulently misappropriated and retained it during a year,' etc. (p. 249). 'Even trusts,' he says, 'were of Egyptian origin' (p. 249). Bold is the man who will say he has found the origin of anything. M. Revillout does not lack courage, but his facts at any rate are welcome, and his book helps us sensibly backward, though we suspect we are still far from the beginning of those institutions we talk of as Roman. The only thing we can be quite safe in asserting is that almost all archaic laws—not less than a certain aspect of the British schoolboy according to Dr. Keate—are very much alike.

A Selection of Leading Cases on various branches of the law: with notes. By JOHN WILLIAM SMITH . . . the ninth edition by RICHARD HENN COLLINS and ROBERT GEORGE ARBUTHNOT. London: W. Maxwell & Son. 1887. La. 8vo. 2 vols. xlviii and 1018 pp.; xxxii and 1020 pp.

THE present learned editors of Smith's Leading Cases have for the third time struggled manfully with 'the numerous decisions and statutes which have been given and passed with respect to the subjects of them.' As the competence of Mr. Collins and Mr. Arbuthnot has already been proved in the seventh and eighth editions, we have done no more than turn to a few recent cases of importance, such as *Foakes* v. *Beer*, *The Bernina*, *Cooke* v. *Eshelby*. We have found them aptly and accurately noted, and, if anything, only too concisely for their importance. But cases reported while a work of this bulk is passing through the press have to be mentioned, not as the editors might choose, but as the exigencies of printing will suffer.

Smith's Leading Cases have long ceased to be either 'a portable collection of leading cases' for the practitioner, or a fitting introduction to the reports at large for the student. The text of many of the 'leading cases' is superseded or even contradicted by later and weightier authority, as Mr. Smith himself would have been the first to recognize, and has become a mere peg to hang notes upon. These notes, again, though of great use to working lawyers, and in part having an almost judicial authority, are far too discursive and technical to be used to good effect by novices. It will be curious to see how long the old pegs will hold out; but we would rather see the learned editors, without waiting for necessity, take courage to do what they are quite competent to do, and Mr. Smith would probably have done if he had lived long enough—revise, supplement, and amend, not only the notes, but the selection of cases itself.

We have also received—

Married Women's Rights and Liabilities in relation to Contracts, Torts, and Trusts. By MONTAGUE LUSH. London: Stevens & Sons. 1887. 8vo. v and 177 pp.—A workmanlike account of married women's capacities and liabilities as they stand since the Act of 1882. The recent authorities are not merely stated, but considered and discussed. Mr. Lush regrets, and perhaps rightly, the continued use of 'separate property' as a technical term, for which however it seems to us that Parliament rather than the judges is answerable. He does not convince us that *Seroka* v. *Kattenburg*, 17 Q. B. D. 177, is wrong; but we agree with him that the decision of Pearson J. *In re Shakespear*, 30 Ch. D. 169, is at least questionable.

The Student's History of the English Parliament in its transformations through a thousand years. By Dr. RUDOLF GNEIST. New English Edition,

by Prof. A. H. KEANE. London: H. Grevel & Co. 1887. 8vo. xxix and 462 pp.—The translator does not inform us of the exact title or date of the original: and this, in the case of a writer who has so often recast his work as Dr. Gneist, is a material omission. We presume however that this volume represents 'Die Entwickelung der englischen Parlamentsverfassung' contributed by Dr. Gneist to the last edition of Holtzendorff's Encyclopädie. Still less do we understand what former English version is alluded to. The present performance appears on the face of it to be workmanlike, and will no doubt serve its purpose of being helpful to English students who do not read German, or do not yet read it with ease.

Histoire de la science politique dans ses rapports avec la morale. Par PAUL JANET. Paris: Félix Alcan. 1887. 2 vols.—This is the third edition of M. Janet's well-known work. The author has made considerable additions. The introduction on the relation of law to politics is new. M. Janet herein discusses, among other things, the efficacy of Declarations of Rights, which he thinks have much greater effect than people are inclined to believe. He regards 'the hollow and chimerical abstractions' of 1789 as the most enduring part of the French Revolution. The *Droits de l'homme* have lasted through all successive governments as the guiding principles of modern French Society. We do not say that M. Janet is wrong. We are inclined to think he is in a certain degree right. That bad governments have come upon the scene with high-flown declarations about the majesty of man has not prevented the principles of 1789 from taking firm root among the French people.

Essai comparé sur les institutions, les lois et les mœurs de la Roumanie depuis les temps les plus reculés jusqu'à nos jours. Par NICOLAS BLARAMBERG. Bucharest. Imprimerie du 'Peuple Roumain,' 1886, 807 pp. —The author was Advocate-General of the Court of Cassation at Bucharest at the time of the Roumanian Coup d'Etat, and resigned on account of his political convictions. His book of course bears the impress of these convictions, but is none the less interesting. The numerous documents collected are interspersed with the text, forming a graphic history of this little state which has worked out its development in spite of as well as along with European assistance.

Notions usuelles de droit public, par J. B. CHASSAING (Paris: Rousseau. 1887), is a handy little book of 120 pages intended for the enlightenment of the fourth form of *Enseignement secondaire spécial* on the political, administrative and judicial organisation of the French Republic.

Les suggestions hypnotiques—une lacune dans la loi, par FRÉDÉRIC DELACROIX (Paris: Chevalier-Maresco & Cie. 1887. 47 pp.), is a further contribution to the intricate question of responsibility under external influence. The author has collected a number of cases in which under hypnotic influence persons have signed engagements. He proposes to forbid by law all experiments except by registered medical men, and even by these except in company with fellow medical men, and with the written authority of the patient.

El Abogado de si mismo. Por EMILIO DAIREAUX. Paris: Delagrave et Cie. 1887. xvi and 650 pp.—M. Daireaux, who is an advocate of Buenos Ayres, as well as of Paris, has rendered excellent service in producing a book on Argentine law for the use of those who have not the time to resort to the sources thereof, but would be glad to have something more than an inkling of it. The subjects dealt with comprise the political

administration and judicial organisation of the Argentine Republic, the legal organisation of its Society, of Property, its divisions, acquisition, possession and transfer, contracts, wills, procedure, commercial and criminal law, agriculture, mines, private international law, and the limitation of actions. Last, but not least, the book has a good index.

Le gouvernement et le parlement britanniques. Par le COMTE DE FRANQUEVILLE. Tome 1er: *Le gouvernement.* Tome 2me: *Constitution du parlement.* Tome 3me: *La procédure parlementaire.* Paris: J. Rothschild. 1887. La. 8vo. xii and 595, viii and 567, viii and 574 pp.—This work is the result of long study and preparation, and appears to be the fullest systematic treatise on English political institutions that has yet appeared outside England. Detailed examination must be postponed; but we may at once call attention to one merit still too rare in Continental books, the presence of an adequate alphabetical index in addition to the table of contents.

A treatise on the law of settlement of property made upon marriage and other occasions. By JOHN SAVILL VAIZEY. La. 8vo. 2 vols. xii and 857—1714 pp. London: H. Sweet & Sons. 1887.—This is on the face of it a work of exhaustive industry. It needs no words to show that the Long Vacation does not suffice for duly reviewing it. Meanwhile we note that Lord Halsbury's Bill comes in for some criticism in the preface, and that the index, besides other help specially acknowledged by the author, is contributed by a 'really, if not conventionally, learned friend,' Miss Orme.

Le statut personnel anglais ou la loi du domicile envisagée comme branche du droit anglais. Par A. V. DICEY . . traduit et complété . . par ÉMILE STOCQUART. Tome 1er. Paris: Librairie A. Marescq aîné. London: Stevens & Sons. Brussels: Bruylant. 1887. 8vo. x and 441 pp.—This translation of 'Dicey on Domicil' is something more than a mere translation, for it has been posted up by the translator, and revised by the author; it is therefore equivalent, for English practitioners who can read French without difficulty, to a new edition of the original.

Zur Lehre von den Pertinenzen. Von Prof. Dr. J. KOHLER in Würzburg. Jena. 1887.—A study of modern civil law on the subjects familiar to English lawyers under the heads of fixtures, appurtenances, and 'general words.' The learned author shows, as usual, the wide scope of his legal studies and observation. The English law of fixtures is not overlooked, and there are a good many medieval quotations from both French and German sources which look interesting.

NOTES.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

THE legal thunderstorm so long expected by those conversant with shipping law has burst, and we can, now that the air is clear, reckon up the damage done. In one hour and a half on July 14 of this year the House of Lords reversed decisions of the Court of Appeal in three shipping cases[1], distinctly overruling in addition two previous decisions of the Court of Appeal, throwing grave doubt upon another case, and indirectly overruling many dicta of many judges. While the result may add certainty to the law, it also renders necessary careful consideration of the effects of the judgments on the old fabric, much of which has been destroyed.

In *The Thames and Mersey Marine Insurance Company* v. *Hamilton, Fraser & Co.*, the respondents' steamer Inchmaree was insured in the usual form against 'perils of the seas . . . and all other perils, losses and misfortunes that had or should come to the hurt, detriment or damage of the aforesaid subject-matter of insurance or any part thereof.' The donkey-pump burst through the choking of a valve, and the shipowners claimed to recover this loss from the Insurance Company under the 'general words' in the policy. The Divisional Court, Mathew and Smith JJ., gave judgment for the shipowners on the authority of *West India Telegraph Company* v. *Home and Colonial Insurance Company*, 1880 (L. R., 6 Q. B. D. 51), in which Lord Selborne and Cockburn C.J. had held that damage caused by explosion of a steamer's boiler was within a similar policy, Lord Selborne apparently on the ground that steam was to a steamer what the wind and sails were to a sailing vessel, and that therefore the loss came by analogy within the 'general words.' Brett L.J., who agreed in the result of that judgment, held that the loss was analogous to loss by fire, so as to fall within the 'general words.' In the Thames case (reported 17 Q. B. D. 195), the Court of Appeal (Lindley L.J. and Lopes L.J.) affirmed the Divisional Court on the authority of the West Indian case, but Lord Esher dissented, disagreeing with the reasoning in his judgment in the earlier case, and holding that this damage was not covered by the general words. The House of Lords now reversed the decision of the Court of Appeal, holding that the 'general words' must be restricted to perils *ejusdem generis* with those specifically enumerated; and that neither the explosion of the boiler in the West Indian case nor the bursting of the donkey-pump in the case under appeal was a marine peril *ejusdem generis* with perils of the sea. Either might have occurred on land as well. The result of this principle was the reversal of the judgment appealed from, the overruling of the case of *West India Telegraph Company* v. *Home and Colonial Insurance Company* (L. R., 6 Q. B. D. 51), and the throwing of grave doubt on the case of *De Vaux* v. *l'Anson* (5 Bing. N. C. 519) in which a ship was seriously damaged while in

[1] A partial report of these Cases appears in the *Times* newspaper for July 15, and in the Times Law Reports for July 20.

dry dock, not supported by water, and the damage was held recoverable under the policy. The decision of the House of Lords is very important to the underwriters, in whose favour it is; and seems in accordance with sound principles of legal construction, if it is possible to speak of such things in connexion with such ungrammatical, elliptical and incoherent documents as policies, charters, or bills of lading, whose true explanation is usually to be found not in the ordinary way, but by considerations of history and business usage.

The other two cases, *Wilson & Co.* v. *Owners of Cargo of Xantho*, and *Hamilton & Co.* v. *Pandorf & Co.*, raise an equally important but more difficult question as to the meaning of the exception 'perils of the sea' in the bill of lading, and the nature of the shipowner's contract, as evidenced in that instrument.

In *The Xantho*, cargo-owners sued shipowners for damage to cargo carried under a bill of lading excepting 'perils of the sea,' but not 'collision,' or 'negligence of servants of shipowner.' At the trial cargo-owners produced the bill of lading, and proved non-delivery of the goods. The burden then lay on the shipowners of bringing themselves within the exceptions in the bill of lading. Their counsel stated, and it was admitted, that the cargo was lost through collision, leaving it uncertain how that collision was caused. In this situation the cargo-owner urged that whether the collision was caused by negligence of the carrying ship, or of the other ship, or of both, in no case was it a peril of the sea. The position that a collision caused solely by negligence of another ship was not a peril of the sea rested on the authority of *Woodley* v. *Michel* (1883), 11 Q. B. D. 47; and on the authority of this case, Sir James Hannen and the Court of Appeal gave judgment for the cargo-owner (reported L. R., 11 P. D. 170). The shipowner appealed to the House of Lords, in effect appealing against *Woodley* v. *Michel*, and against the rule that damage by sea-water caused by negligence of a person for whom the shipowner was not responsible as his servant or agent, is not a peril of the sea.

In the case of *Hamilton* v. *Pandorf*, that interesting but unpopular animal, the rat, established still more firmly his claim to legal immortality. *Dale* v. *Hall* (1750) (1 Wils. 281) had decided that if on board ship he was not an 'act of God.' *Kay* v. *Wheeler* (1867), L. R., 2 C. P. 302, and *Laveroni* v. *Drury* (1852), 8 Ex. 166, had held that if he confined his attention to eating cargo, the loss of the cargo was not a 'peril of the sea.' The rat or rats on the SS. Incherona, owned by Messrs. Hamilton and Co., were obliging enough to raise a new point by eating a leaden bath-pipe, communicating with the sea, whereby salt water entered the hold and damaged cargo. The question then arose whether such sea-damage caused by the voracity of rats was a peril of the sea, excusing the shipowner or not. Mr. Justice Lopes held that it was, in a judgment (reported L. R., 16 Q. B. D. 629) which can curiously enough be converted by re-arrangement of its propositions into a syllogistical demonstration of the exact opposite of the proposition it professes to determine. He defines 'perils of the sea' as 'damage to goods in a seaworthy ship caused by the action of the sea during transit, not attributable to the fault of anybody.' On the case coming before the Court of Appeal (L. R., 17 Q. B. D. 670), the decision of Lopes L.J. was unanimously reversed, Lord Esher holding that not the 'immediate cause' of the damage, but the 'real effective cause' must be looked to; that here the 'real effective cause' was a rat, in no sense a peril peculiar to the sea; and that therefore, though the immediate cause, sea-water, might in itself be a peril of the sea, the real cause not being such a peril, the

shipowner was liable for the resulting damage. Bowen and Fry L.JJ. arrived at the same result in another way, holding that at any rate a loss which the exercise of reasonable skill and diligence on the part of the shipowner might have averted was not a peril of the sea, that the shipowner must bring himself within this exception by proving that he could not have so averted the loss, and that in this case he failed to prove this, and to show that he could not have freed his ship from rats by any reasonable precautions; they therefore held him liable. What would be the result if he had proved this, they left open as an 'improbable,' 'academical' and 'hypothetical question.'

In these two cases the House of Lords had therefore to dispose by inference of a general question of the greatest importance, the nature of the shipowner's contract to carry, the effect on it of the 'exceptions,' or 'excepted perils,' and the proper rules of construction to be applied to such enumeration of excepted perils. Lord Herschell in *The Xantho*, Lord Halsbury in *Hamilton* v. *Pandorf*, laid down that the exceptions have the same meaning in both policies of insurance, and charter-parties or bills of lading, but that in the latter case they may be prevented from excusing the shipowner, if he has broken his substantive contract to carry with reasonable care. If he has carried with reasonable care, he will be excused wherever the immediate cause of loss is one of the excepted perils, though some antecedent link in the chain of causation may not be within the exception. 'Perils of the seas' therefore will mean the 'damage caused by the entrance of the sea into the vessel;' but this exception will only protect the shipowner, if he has used reasonable care in carriage, which in relation to sea damage will mean providing against every sea casualty which can be reasonably foreseen as one of the necessary incidents of the adventure.

Applying this construction to the two cases before them, the House held that damage by sea-water entering the ship in consequence of a collision was a peril of the sea, and that, if it was not caused by the negligence of the carrying ship, the fact that there was negligence on the part of the other ship was immaterial. The decision of the Court of Appeal was therefore reversed, and *Woodley* v. *Michel* (11 Q. B. D. 47) was formally overruled. Other consequences not directly alluded to follow from this decision. The exception 'collision' in bills of lading loses the greater part of its meaning; for every sea-damage caused by collision is now a 'peril of the sea,' unless it is proved that the shipowner or his servants were negligent. The question 'whether the shipper must prove the negligence or the shipowner his absence of negligence' was expressly left undecided by Lord Herschell, though he obscurely intimated his view that the shipowner must do so. This seems correct; for if the shipper proves failure to deliver goods, which is *prima facie* a breach of the contract, the shipowner can only exonerate himself by showing that he has in reality performed his contract, i. e. has carried with due care. If this is correct, the exception 'collision' may have the effect of shifting the onus of proof to the shipper (compare *Czech* v. *General Steam Navigation Company*, L. R., 3 C. P. 14, in which the presence of the exception 'free from leakage' was held, where goods were damaged by leakage of oil, to throw on the shipper the burden of proving negligence of the shipowner); but it is very doubtful whether this decision also can stand in view of the principles laid down by the House of Lords.

Further, in *S. S. Garston Co.* v. *Hickie Borman*, 18 Q. B. D. 17, the Court of Appeal had held that though a collision caused by negligence of the other ship was not a peril of the sea within the bill of lading, it was 'a danger

and accident of navigation,' and that the main danger which those words covered was that caused by the negligent navigation of other ships, or by causes within human control other than that of the shipowner and his servants. But the decision of the House of Lords has swept away the ground of this decision; such damage is now a peril of the sea, and the words in almost every bill of lading, 'dangers and accidents of navigation,' which date at least from 1864, must now be treated either as meaningless, or as exempting the shipowner from damage done to the cargo by the navigation of the carrying ship; and as without the exception he would not have been liable for this, if the ship was navigated with reasonable care, it would on this view go further and free him from negligent navigation of his ship, thus covering the same ground as the exemption of negligence.

In *Hamilton* v. *Pandorf*, the Lords, carrying out the general principles laid down above, held that the damage to the rice being damage by sea-water was a peril of the sea. The Lord Chancellor treated it as admitted that the ship was seaworthy and that there was no negligence in the shipowner. Judgment therefore followed for the shipowner, the decision of the Court of Appeal being reversed.

This decision is very unsatisfactory. The only facts before the Court were an admission of the cargo-owners that 'all reasonable precautions had been taken to keep down the rats on the voyage to Akyab,' the port where the cargo was shipped; and a finding of the jury that the rats causing the damage were not brought on board by the shippers in the course of shipping the rice. This left untouched the questions whether the ship was 'cargo-worthy' as regards rats, either on starting for Akyab or from Akyab, and whether either before starting for Akyab or at Akyab reasonable means were used to keep down rats: and on the absence of evidence on this point Bowen and Fry L.JJ. based their judgment (see 18 Q. B. D. at p. 686). The Lord Chancellor appears, with due submission, to misapprehend the state of the facts in saying that 'it is admitted that the ship was seaworthy.' Some of the Lords suggest that the shipper should have brought the question before the jury; but if the principles laid down by the House of Lords are correct, it would be the duty of the shipowner to negative negligence or unseaworthiness. It is a great misfortune that so important a doctrine should be settled on such doubtful facts.

The particular distinction itself is very curious. If the rat eats the cargo, the damage to the cargo is not a peril of the sea (*Laveroni* v. *Drury*, 8 Ex. 166, adopted by Lord Halsbury). If the rat eats the woodwork of the ship, so that though no water comes in she becomes unseaworthy and is condemned as a total loss, the loss is not a peril of the sea under a policy of insurance (*Hunter* v. *Potts*, 4 Camp. 203, not mentioned by the House of Lords). But if the rat instead of eating the cargo eats a bath-pipe, so that water comes in to the cargo, or if instead of eating half-way through the ship's side he eats right through, so that salt water comes in and sinks the ship, this is a peril of the sea within the decision of the House of Lords. If the bath-pipe contained fresh water I suppose it would not be. The principles of the decision may be sound, but the results look very curious.

With respect, it is doubtful whether the principles are sound either historically or on the true construction of the actual words used in the contract.

The principle of the decisions appears to be that the contract of the shipowner as contained in charter-parties or bills of lading is to carry the goods with reasonable care and diligence, unless prevented by the excepted perils (see Lord Herschell's approval of the statement of Willes J.

to this effect). This principle undoubtedly finds support in the many dicta of about thirty years ago, e. g. of Mr. Justice Willes in *Grill* v. *Iron Screw Colliery Co.* (1868), L. R., 1 C. P. 614, 'The contract is to carry with reasonable care unless prevented by the excepted perils;' *Notara* v. *Henderson* (1872), L. R., 7 Q. B. at p. 236, 'The exemption is from liability for loss which could not have been avoided by reasonable care and diligence;' and of the Court of Exchequer in *Laurie* v. *Douglas* (1846), 15 M. & W. 746, where a direction to the jury that a shipowner was only bound 'to take the same care of goods as a person would of his own goods, i. e. an ordinary and reasonable care,' was held a proper direction.

It is difficult on this principle to give any intelligible meaning to the words of the bill of lading, 'shipped in good order and condition . . . to be delivered in like good order and condition, the act of God . . . excepted.' If the contract is as stated by Willes J. in *Grill* v. *General Screw Colliery Co.*, and approved by Lord Herschell in *The Xantho*, 'to carry with reasonable care unless prevented by the excepted perils,' these exceptions are meaningless; there is no need for the excepted perils. For no loss *is* caused by an excepted peril, which the shipowner could have prevented by reasonable care. No peril is an 'act of God' if it could have been prevented by reasonable foresight and care (*Nugent* v. *Smith*, L. R., 1 C. P. D. 34; *Nichols* v. *Marsland*, L. R., 2 Ex. D. 1). No peril is a peril of the sea 'which could be foreseen as one of the necessary incidents of the adventure' (Lord Herschell in *The Xantho*). No act is barratry which could have been prevented by reasonable diligence on the part of the owner or the master. It would be sufficient that the contract should read 'to carry with reasonable care.' If the shipowner did so, he would not be liable for damage which could not be prevented by reasonable care, without the addition of any list of excepted perils. If he did not do so, he would be liable for damage caused by his omission whatever perils were excepted. The reading of the shipowner's contract by the House of Lords appears to give no meaning at all to the presence of the excepted perils. It can hardly be said that their sole effect is to throw the burden of proving want of reasonable care on the shipper, if the shipowner *prima facie* brings himself within the excepted perils (*Czech* v. *General Steam Navigation Co.*, L. R., 3 C. P. 14). For if the shipper proves presumed breach of contract by non-delivery of the goods, the shipowner must on this view prove he has performed the contract by 'carrying with reasonable care,' before the excepted perils come in.

Another view of construction was suggested by Willes J. in *Notara* v. *Henderson*, L. R., 7 Q. B., at pp. 235, 236: 'The exception in the bill of lading only exempts the shipowner from the absolute liability of a common carrier, and not from the consequences of the want of reasonable skill, diligence, and care.' This seems to represent the contract as one (*a*) to carry at shipowner's risk absolutely, (*b*) unless the damage is caused by excepted perils, (*c*) provided the shipowner and his agents have used reasonable care to prevent such damage. This obviously does not agree with the view of the contract approved by Lord Herschell, 'to carry with reasonable care, unless prevented by the excepted perils.' And in this view, if damage was caused by a peril not excepted, the shipowner would be liable, though he had used the utmost diligence.

It is submitted that this view of the contract is at any rate correct, so far as it states that the original contract of the shipowner starts with absolute liability. This was so laid down by Bowen L.J. in the Court of Appeal in *Pandorf* v. *Hamilton* (17 Q. B. D. at p. 683): 'By the common law of this

country . . . a carrier at sea was liable for loss or damage to goods except only in the event of accidents caused by the act of God or of the King's enemies,' which are the ordinary common carrier's exceptions. These exceptions are not even expressed in the form of bill of lading dated 1598, given in West's Symboleography (edd. 1632 and 1647), § 659.

The absolute liability of the shipowner subject to the exceptions of act of God and the king's enemies is involved in the early cases of *Rich* v. *Kneeland* (1613), Hobart, 17; *Symons* v. *Darknoll* (1628), Palmer, 523; *Nichols* v. *Moore* (1661), 1 Sid. 36, and *Morse* v. *Slue* (1671), 2 Keb. 866, et multis aliis locis: (see also the discussion of the matter in O. W. Holmes, Common Law, ch. v, on Bailments). It is also expressly laid down in *Laveroni* v. *Drury* (1852), 8 Ex. 166, and in *Kay* v. *Wheeler* (1867), L. R., 2 C. P. 302, where the contract is treated as 'an express contract to deliver the goods in good condition, except in the four specified cases.' It is involved in the law settled by the House of Lords in *Steel* v. *State Line Co.* (1877), L. R., 3 App. C. 72, and followed in *The Glenfruin* (1885), L. R., 10 P. D. 203, that the shipowner gives an absolute warranty that his ship is seaworthy, and free from defects, even those which he could not discover by any reasonable care or foresight.

If this is the original contract—to carry safely—how do the exceptions affect it? It will then read, 'to carry safely, unless prevented from so doing by,' or, 'unless the damage be caused by, the perils excepted.' The interpretation hitherto put on this proviso was that the cause preventing the safe carriage was the real or effective cause; and that this must fall within the excepted perils, to excuse the shipowners. This rule of construction was expressed, perhaps unfortunately, in the formula that in the construction of policies of insurance, only *causa proxima* was to be considered; in the construction of charter-parties and bills of lading, *causa remota* or *causa causans* might be looked to. As far as I can gather, this principle appears for the first time in 1864, in the argument of Brett Q.C. in the case of *Lloyd* v. *General Screw Colliery Co.* (1864), 3 H. & C. 284. Here the present Master of the Rolls argued, 'In a contract of insurance the *causa proxima* must be considered . . . under a bill of lading, the *causa causans* must be regarded;' and Pollock C.B., giving the judgment of the Court, said, 'It appears to me clear upon the authorities'—which were almost entirely text-book definitions of perils of the sea—'that Mr. Brett's proposition is correct, and that in cases of this kind we must look not at the *causa proxima*, but the *causa causans*, or real cause of the loss;' and the present Lord Bramwell says, 'Upon the authorities I am satisfied that Mr. Brett is right.' Thus, curiously enough, Lord Bramwell, having been a member of the Court which first laid down the distinction of *causa proxima* and *causa causans* in these cases, was twenty-three years later a member of the Court which gave it its death-blow. The distinction thus laid down was repeated in later years by many judges, amongst others by Sir R. Phillimore in *The Chasca* (1875), L. R., 4 A. & E. 466; by Manisty J. in *Chartered Bank* v. *Netherlands Co.*, 9 Q. B. D., at p. 126; by Brett M.R. and Lindley L.J. on the same case, on appeal, 10 Q. B. D., pp. 531, 543; and by Lord Esher, in the case under appeal, 17 Q. B. D., at p. 675.

This formula of *causa causans* and *causa proxima* must now be treated as at best too wide a statement of the rule, that where the real cause of loss is the negligence of the shipowner or his servants, the fact that the immediate cause of loss is an excepted peril will not protect him. It may be doubted however whether the rule did not really mean that the 'peril' from damage by which the shipowner was 'excepted' was the real cause, the efficient

cause, the cause which initiated a change in the normal order of things. Thus where a seaworthy ship is carrying cargo in a smooth sea, but water enters the hold and damages the cargo, it would seem obvious to hold that the real cause of the 'sea damage'—the cause which directly led to the sea-damage—was the eating of a hole in a water-pipe by a rat, whereby a chain of events other than the normal one was set in motion. That, similarly, where in fair weather two ships collide, and, water entering through a gap in the side made by the collision, the cargo was damaged, the real cause of the loss was the negligence of the other ship, without which no collision would have occurred. And if, as the House of Lords say, a rat eating cargo is not a peril of the sea, it is difficult to understand how either a rat eating a bath-pipe or the negligence of a man are 'perils of the sea' for damage from which the shipowner is not liable. He is not liable for damage arising from or caused by excepted perils; and it would appear more reasonable to hold that the real cause of the chain of events leading to the damage should be looked to, rather than the link in that chain immediately preceding the damage, and that only. The shipowner suffers no harm; he adds to his list of exceptions; *Woodley* v. *Michel* produced the exception 'collision;' and after the Liverpool exceptions negativing the warranty of seaworthiness, there seems no limit to the endurance of shippers.

The judgments of the House of Lords are final; it can hardly be said in this case that they have settled the law; they have certainly materially weakened the *prestige* and authority of the Court of Appeal; and it is very doubtful whether they have laid down rules of construction for mercantile documents satisfactory from the point of view either of logic or of history.

T. E. S.

Every public teacher throughout the United Kingdom owes a debt of gratitude to Professor E. Caird for having appealed to the House of Lords against the decision of the Court of Session. *Caird* v. *Sime*, 12 App. Cas. 326, will long remain the leading case on the right of a professor to prohibit the printing of his lectures without his consent. The decision is of such importance that it is worth while briefly to note its main points.

1. The point actually decided is that a professor of a University, who delivers orally in his class-room lectures which are his own literary composition, does not thereby, as matter of law, communicate such lectures to the whole world so as to entitle anyone to republish them without further permission.

2. The broad principle in accordance with which this conclusion is arrived at is that in determining whether an address made by a professor or other person to any audience is 'published' in the sense in which 'publication' makes the address so much the property of every one that any hearer who chooses may republish it, depends upon the objects, the conditions, and terms on which it is delivered. This broad principle covers every case, and fully explains why some speeches, addresses, or lectures may be reprinted by anyone who chooses whilst others may not. A speech, for example, by a Member of Parliament delivered at a public meeting is clearly meant by the speaker to be published far and wide; the newspaper which prints it furthers the orator's object. The same thing is perhaps maintainable with regard to sermons delivered in places of worship. A preacher addresses everybody who will come to church or chapel; his aim presumably is to circulate the truth as widely as he can. This end is furthered by the wide publication of his sermons. This presumption, however, might easily, it would seem, be rebutted by special circumstances, and *Caird* v. *Sime* certainly suggests the conclusion that sermons might be delivered under

conditions which precluded the right of any hearer to print a report of them. Lectures, on the other hand, such for example as those delivered by Mr. Thackeray or Mr. Dickens, are under the principle of *Caird* v. *Sime* clearly protected. They are delivered to amuse or interest the audience; their pecuniary value to their author would be much diminished by their general publication. They are therefore delivered under the implied terms that no one shall reprint the lecture except under the author's license. A professor again, according to the view adopted by the House of Lords, delivers his lectures for a special object, namely, for the instruction of his pupils. This object does not involve the conferring on students the right to print what they have heard. This is so far from being the case that the publishing of inaccurate notes taken down by an ignorant hearer from the mouth of an instructed teacher would be injurious at once to instructors and to students. It is therefore plain that as far as the intention of the professor goes, he delivers his lectures on the terms that the hearers should use his words for the promotion of their own knowledge and education, but should not deprive him of the property which he undoubtedly possessed in his literary compositions before he read them to his class. This in the opinion of the House of Lords, and, as it seems to us, in accordance with common sense, is decisive of the whole matter. A lecture is communicated to the professor's pupils, but is not published to the world; it has not therefore become the property of the public.

3. The great importance of *Caird* v. *Sime* is that, following out the principle of *Abernethy* v. *Hutchinson*, 1 H. & T. 28, it puts the rights of University professors and others on a foundation of principle quite independent of statute. The Act 5 & 6 Will. IV, c. 64, apparently leaves common law rights untouched; it is intended to protect, not to diminish the rights of lecturers.

4. The opinion maintained by Lord Fitzgerald, though not assented to by the House of Lords, that the delivery of a professor's lectures to his class constitutes publication to the world, is certainly in itself theoretically tenable. We cannot say as much for his lordship's very singular interpretation, or misinterpretation, of Lord Eldon's reference to Blackstone's lectures; and though there is a good deal to be said in favour of Lord Fitzgerald's position, it is hardly possible not to feel that there is something calling at any rate for remark in the course taken by the judges of the Court of Session. As far as an English lawyer can understand it, the majority which gave judgment against Professor Caird was obtained by a singular combination of two minorities. Some of the majority held that Professor Caird's view of the facts was wrong, whilst his view of the law was right. Another portion of the majority held that Professor Caird's view of the facts was sound, but his view of his legal rights was wrong. Hence judgment was apparently given against him by judges of whom some held that his lectures had not been printed, though if they had been printed the Professor had a right to object to their unauthorised publication; and others held that the lectures had certainly been printed without the Professor's authority, but that he had no legal right to object. Such coalitions of men who arrive at the same practical result from inconsistent premisses are more common in Parliament than in the Courts. When we add to this that the Court of Session, in defiance of an Act of Parliament, gave judgment in such a shape that it was all but necessary to remit the case to the Court of Session, Scotch professors and others may, we conclude, give thanks that we have still a House of Lords as a final Court of Appeal.

A correspondent sends us some further notes on *Caird* v. *Sime* with special reference to its bearing on University lectures:—

In the case of *Abernethy* v. *Hutchinson*, the plaintiff who complained of a similar wrong was under no duty to lecture, and his lectures were not open to the public, but could only be attended by those to whom he gave permission. And Lord Eldon held that there was an implied contract that the audience should not publish what they heard. He also emphatically identified the case of Abernethy with that of the lectures of Blackstone when Vinerian Professor at Oxford; nor is it conceivable that that great judge could have overlooked the difference between public and private lectures. Lord Eldon goes on to say, 'Nor can I conceive on what ground Sir W. Blackstone had the copyright in his lectures for 20 years if there had been such a right as that' (i. e. of the students to publish). Lord Fitzgerald, when commenting on this in his dissenting opinion, remarked that Lord Eldon is obviously referring to the Commentaries, not to the Lectures, and that Blackstone had undoubted copyright in the Commentaries under the Statute of Anne. To which Lord Watson answers that in the preface Sir William Blackstone says that the following sheets contain the substance of a course of lectures on the laws of England, read by him in the University of Oxford, and Lord Eldon took notes, and knew whether they were substantially the same. If they were (and that they were so is really notorious) the Statute of Anne could not give copyright of the original text.

While this case was under appeal, a curious incident took place in the University of Edinburgh. Several students subscribed a fellow student's fees for a course, on condition that he, being cunning in shorthand, should take verbatim notes and give a copy to each of the subscribers. This notable device was detected; a compromise was made, but now we may suppose that such conduct would meet with severer notice.

The general rule seems to be this; that *A* has no right to report or reproduce in public the literary composition of *B*, oral or written, without *B*'s consent express or implied. A license to *A* to be in a given place at a given time in order to hear *B*'s composition does not of itself include license to reproduce, and may on the contrary imply a condition that the matter shall not be reproduced.

Question might be made whether the decision of the House of Lords covers certain lectures specially announced as 'Public Lectures' in the University of Oxford. It seems that it does, for the publicity is not absolute; members of the University, whether members of the professor's ordinary class or not, are entitled to attend; other persons are in practice rather encouraged to come if they choose, but it is apprehended they could not claim as of right to be present. Such lectures in fact are 'public' only with regard to the internal economy of the University.

Howarth v. *Brearley*, 19 Q. B. D. 303, decides that a qualified medical practitioner cannot recover charges for medical aid rendered in effect by an unqualified assistant without consulting the qualified practitioner. The decision is in accordance with the principle involved in *De la Rosa* v. *Prieto*, 16 C. B. N. S. 578 (a case by the way which, to our surprise, we were unable to find in the recent edition of Fisher's Digest), and, in spite of its apparently going against some earlier cases, is in accordance with good sense. It is impossible however for anyone to look at the decisions with regard to the position of unqualified medical practitioners, and especially

Davies v. *Makuna*, 29 Ch. D. 596, without having the impression forced upon his mind that the law on the subject is neither satisfactory nor clear. That this is so will be admitted by anyone who considers the following points.

1. Persons not duly qualified do, we believe, practise different forms of medical art, and do, we suppose, constantly receive payment for their services.

2. It is not clear why persons who render services for which those who benefit thereby think it worth while to pay should be disabled by law from recovering payment for services rendered. Yet it is clear enough that an unqualified medical practitioner cannot bring a successful action for the recovery of his charges.

3. If it be public policy, as it well may be, to forbid the practice of medicine by persons who cannot give proof of proper medical qualifications, the law, one would suppose, ought to impose penalties on the practice. Now *Davies* v. *Makuna* distinctly proves that a very competent judge may hold such practice to be lawful. Grant however that Pearson J. was wrong and the judgment of the Court of Appeal right, that judgment itself turned on the terms of an enactment 55 Geo. III, c. 194, s. 14, affecting a particular class of practitioners only, namely apothecaries, and the Court of Appeal declined to determine whether an old statute, 14 & 15 Hen. VIII, c. 5, was or was not still in force.

The result therefore follows that the law as to the position of unqualified practitioners neither corresponds with the habits of ordinary life, nor is certain or clear enough to put any real check upon practices which the law means to condemn. For a final oddity, the dignity of a Fellow of the College of Physicians is marked in the same way as the indignity of the unqualified practitioner—by disability to recover his fees. Sir Andrew Clark cannot sue for his fees; Sir Henry Thompson can; the late Mr. Hutton could not. This curiosity, however, has its parallel in our own profession.

No legal problem involves more niceties than the fixing of the measure of damages. The difficulty lies generally in applying one or two simple principles of logic to complicated circumstances. *Schulze* v. *Great Eastern Ry. Co.*, 19 Q. B. D. 30, follows and applies the sound principle established by *Wilson* v. *Lancashire & Yorkshire Ry. Co.*, 9 C. B. N. S. 632; 30 L. J. C. P. 232. That case establishes that the carriers of goods for a particular market, who know that they are being so carried, may, if through their negligence the goods are delivered too late for the market, be made liable for the loss of the market, or, in other words, for the difference between the value of the goods to the consignors at the time when they were delivered, and their value at the time when they ought to have been delivered. *Schulze* v. *G. E. Ry. Co.* applies this principle to 'samples' which were to be sent by the railway for a Scotch firm so as to be of use for obtaining orders at Paris, but were delivered too late to be of any value. The principle and its application are clearly right: they both apply the canon which lies at the bottom of the law of damages for breach of contract, namely that *X* is liable to pay *A* such damages for *X*'s breach of contract as will put *A* in the position in which he would have been if it had been performed. But *Schulze* v. *G. E. Ry. Co.* will lead to misapprehension unless two things be observed. First, the Court upholds the principle, which is clearly sound, that *A* ought not to be compensated for the loss of expected profits. This is right, for if the samples had been

duly delivered the profits would still have remained to be made. Secondly, the Court assume that the railway company had in effect notice that the samples were sent with a view to a particular season; otherwise the company would not have been liable, since the loss of the season would have been a loss which they had no reason to anticipate.

Beckett v. *Tasker*, 19 Q. B. D. 7, carries out to the full the principle that since as before the passing of the Married Women's Property Act, 1882, a married woman is not in strictness liable for debts contracted during marriage. The liability is incurred by her 'separate property,' and exists in so far only as her separate property is not liable to restraint on anticipation. This distinction between the liability of the married woman herself and the liability of her separate property is, as *Beckett* v. *Tasker* shows, not merely theoretical. Under the law, as it at present stands, a married woman, though having the rights of a *feme sole*, enjoys protection not accorded to an unmarried woman. This state of things cannot last. The law must ultimately give a married woman all the property rights, and impose upon her all the contractual liabilities of a *feme sole*. Indeed it seems a pious opinion that the Legislature intended to do this in 1882, but came short of executing its intention by defects of workmanship.

The Queen v. *Cuming*, 19 Q. B. D. 13, determines a matter, which on grounds both of good sense and on authority appears almost too clear to need decision, namely that a commissioned officer in the Royal Navy, who has accepted an appointment to serve on board one of H.M.'s ships in commission and who is entered in the ship's books, is not entitled without permission from the Admiralty to resign his commission and to leave his ship.

The case is however worth notice for two reasons. It is, in the first place, an example of the way in which under the English constitution the ordinary Courts determine matters affecting the whole discipline of the royal forces. It betrays, in the second place, a tendency on the part of officers to forget that the freedom of private life is not compatible with the enjoyment of military or naval offices. We are heartily glad that the decision will check the spread of disgracefully lax notions of discipline.

Who is a 'person aggrieved?' This is a question which has divided the Court of Appeal. The majority of the Court have held *In re Reed & Co.*, 19 Q. B. D. 174, that an Official Receiver in bankruptcy is a party aggrieved by the refusal of a Registrar to make an order adjudicating a debtor bankrupt and therefore has, as such party, a right of appeal against the refusal under the Bankruptcy Act, 1883, s. 104. The decision is satisfactory as it gives full effect to the policy of the Bankruptcy Act, and, though we quite understand the difficulty felt by Lord Justice Fry in holding that a Receiver is aggrieved by a decision which in no way affects his personal interests, rights, or feelings, still we incline to hold that the Court is verbally right. Any person who is in any sense a party to a legal proceeding is aggrieved by a wrongful decision with regard to it.

No one doubts, we suppose, than an officer in whose name an action is brought must be treated as a person who has an interest in the action, though he may not personally care two straws whether judgment is or is not given in his favour, and there is no clear reason why an Official Receiver should not be as much aggrieved by an adverse decision as a

Secretary in whose name a company is empowered to sue. The Receiver represents the 'grievance' of the public, just as the Secretary represents the interests of the company.

In re Betts, 19 Q. B. D. 39, decides that a bankrupt cannot be compelled to submit to medical examination with a view to a policy being effected on his life even where his doing so directly affects the saleable value of his property. The decision agrees with *In re Garnett*, 16 Q. B. D. 698. A critic may doubt whether it does not cut down unduly the meaning of the Bankruptcy Act, 1883, ss. 24, 28, and contravene the policy of the Act.

In re Mutton, 19 Q. B. D. 102, gives a singularly narrow interpretation to the provision of the Bankruptcy Act, 1883, s. 28, requiring a bankrupt to keep such accounts as are usual and proper in the business carried on by him, and as sufficiently disclose his business transactions. *X*, the bankrupt, is a hatter; he also buys houses for building purposes, and incurs liabilities as the promoter of an Hotel Company. He keeps proper accounts of his trade as a hatter, but does not keep proper accounts of his other transactions. According to the Court of Appeal he is under no obligation to keep accounts of such transactions as do not fall within his trade as a hatter. The Court may no doubt be right. We can only repeat that their decision gives a narrow effect to an enactment of which the terms are very wide.

The Queen v. *Lloyd*, 19 Q. B. D. 213, is one of those cases which everyone feels to be rightly decided, and yet leaves on the mind of every sensible man a feeling of dissatisfaction. *X* is convicted of perjury alleged to have been committed before 'the Court' under the Bankruptcy Act, 1883, section 27. What really happened was this:—he was sworn before the Registrar, who then ceased to have anything to do with the matter, and *X* was examined by the Solicitor for the Receiver out of the Registrar's presence. The Queen's Bench Division under these circumstances hold that *X* was never examined before any Court, and quash the conviction. The judgment is clearly right. But the reflection inevitably suggests itself that the law as exemplified by this case is astonishingly favourable to perjury. *X* is found guilty of a gross moral offence which pre-eminently deserves punishment. He escapes scot-free, because of an irregularity which in no way detracts from his moral culpability.

Cutler v. *North London Railway Company*, 19 Q. B. D. 64, determines two points of some interest, in so far as any matter of law can now be settled by a Court of first instance.

The first point is that a railway company cannot make it a condition of their liability for a passenger's luggage that it shall be fully and properly addressed with the name and destination of the owner. Such a condition is in the opinion of the Q. B. D. not 'just and reasonable.' Whether Lord Bramwell and his colleagues will, when the case comes before them, agree with the Q. B. D. is open to doubt. The fact that no two Courts seem capable of coming to the same conclusion as to the 'reasonableness' of conditions for the carriage of a passenger's luggage suggests doubts as to the possibility of fixing by judicial decision what is a 'reasonable' rent for land.

The second point is that a railway company may be liable for passenger's luggage as gratuitous bailees where from some breach of contract on the

passenger's part they may not be liable as common carriers. This view of the law certainly suggests some curious questions. Is it possible for a person who has received goods for payment under a contract of carriage also to be liable as a gratuitous bailee? The enquiry may seem purely theoretical, but it should be remembered that speculative legal problems are certain in the course of time to reappear in a practical form.

Cambefort v. *Chapman*, 19 Q. B. D. 229, is a legitimate extension or rather application of the principle maintained in *Kendall* v. *Hamilton*, 4 App. Cas. 504. If an unsatisfied judgment against one joint contractor is a bar to any action against his co-contractor on the same contract, it certainly seems to follow that an unsatisfied judgment against *X* on a bill of exchange given by *X* alone for the joint debt due from *X* and *Y* is a bar to any action against *Y* for the original debt. There is no reason to question the legal correctness either of the principle maintained in *Kendall* v. *Hamilton*, or of the extension (if extension it be) given to it in *Cambefort* v. *Chapman*. Why, however, under any rational system of law should an unsatisfied judgment against *X* relieve *Y* from a just liability? This question is easier to ask than to answer. The judges who decided *Kendall* v. *Hamilton* did not profess to answer it.

The decision in *Gardner* v. *Mansbridge*, 19 Q. B. D. 217, accords with common sense. No one can believe that a person who picks mushrooms on land not his own is guilty of 'wilfully or maliciously committing damage, injury, or spoil to or upon any real property.' This case, however, taken together with *Laws* v. *Eltringham*, 8 Q. B. D. 283, illustrates two points to which we have more than once called attention. The first is the confusion introduced into English statutes, and indeed into English law generally, by the indefiniteness of such elementary terms as 'real property' and 'personal property.' The second is the way in which this confusion is intensified by the bad English employed by draftsmen, and the fluctuating and confused use of such elementary conjunctions as 'and' and 'or.' The enactment 24 & 25 Vict. c. 97, s. 52, is certainly not worse drawn than other sections of the various Criminal Law Amendment Acts; but for all that its main provision is contained in a sentence such as any competent writer would be ashamed to produce in any book, review, or article, to which he puts his name. Lastly, country magistrates are often charged with straining the criminal law to punish as petty offences what are really petty civil trespasses. It is pleasing to note that in this case the Court had not to restrain justices from doing this, but on the contrary to uphold a righteous and humane judgment.

Is Jersey within the 'United Kingdom?' Every lawyer would, if consulted, say off-hand that it was not. Yet the Queen's Bench Division have held in *Stoneham* v. *The Ocean &c. Accident Insurance Co.*, 19 Q. B. D. 237, that a policy insuring against accidents occurring in the United Kingdom includes an accident happening in Jersey. It is probable enough that the insurance company intended to include Jersey. It is even more likely that neither the assured nor the company ever considered whether the Channel Islands were or were not included in the term 'United Kingdom.' But it is rather a dangerous principle to give to a term which has a strict and perfectly intelligible sense, a meaning which it does not properly bear, because the parties to a contract may have given it an incorrect signification.

Most persons will feel that the judgment of the Court of Appeal in *Crears* v. *Hunter*, 19 Q. B. D. 341, does practical justice, but the same thing might be said of almost any judgment which overrode or curtailed the rule that a promise, though intended to be legally binding, is invalid if given without consideration; and it is rather difficult on speculative grounds to see how the judgment in *Crears* v. *Hunter* can be made consistent with the admitted principles of the law of contract. The case put in its simplest form is this: *X* in order to induce *A* not to sue for a debt due from *M* of £200, signs a promissory note whereby he undertakes to pay *A* the £200 with interest in half-yearly instalments. *A* enters into no engagement not to sue for the £200. He does, however, as a matter of fact, forbear from suing. The amount is not paid and *X* pleads that the note is made without consideration. The Court hold that the actual forbearance to sue was a consideration. Now if the note could be treated as an offer by *X* to undertake to pay *A* £200 in consideration of *A*'s forbearance to sue *M*, then it is clear enough that the actual forbearance to sue *M* would be at once an acceptance of the offer and a consideration for the promise. This is indisputable. If on the other hand it could be said that *A* at the time when the note was made promised not to sue *M*, then again there would of course be a consideration for the note. But neither of these circumstances appears to have existed. The note was intended as the contract. If so the promise was, when made, without consideration. The Court seemed to fluctuate between two views: first, that the note was in effect an offer accepted by forbearance; secondly, that it was understood, or in other words agreed, that the plaintiff should forbear, in which case no doubt there was a consideration for the signature of the note. But as neither view is made quite distinct, the judgment is not free from perplexity.

What is a 'final' judgment? This is the enquiry which Mr. Justice North had to answer in *Nouvion* v. *Freeman*, 35 Ch. D. 704. The main difficulty in finding a satisfactory reply consisted in determining the exact effect of a complicated system of procedure peculiar perhaps to Spain, and at any rate very unlike anything known to English practice. This difficulty was increased by our English habit of ascertaining foreign law through the evidence of experts who inevitably speak under a bias. It is probable, however, that the judge arrived at a right conclusion. No one but an accomplished Spanish lawyer can assert this with confidence, but it is hard to see how any English judge could, under the circumstances, form a better opinion than Mr. Justice North. Nor, to say the truth, if only the matter be distinctly determined one way or the other, is it of great consequence to Englishmen whether a Spanish judgment in 'executive' proceedings be or be not held final. What is of much more importance is that a clear principle should be adopted discriminating the cases in which a foreign judgment is from the cases in which a foreign judgment is not entitled to enforcement by action in an English Court. All the talk about comity is now admittedly irrelevant or absolutely misleading. The rule now constantly cited by the Courts that 'the judgment of a Court of competent jurisdiction imposes a duty or obligation on a defendant to pay the sum for which judgment is given, which duty the English Courts are bound to enforce' goes in the right direction, but it does not serve to explain the point really requiring explanation, namely when it is that this duty does and does not arise. Our own belief is that the problem must be approached from the other side. The question to be asked is, when is it that a foreign Court, or, in other words, a foreign sovereign, 'has a right'

in the opinion of English tribunals to give judgment in a given matter? The main though not the only source of this 'right' is the power actually to enforce the judgment upon the person against whom it is given. Little light however is thrown on this matter by Mr. Justice North's decision, though it contains one or two suggestive remarks.

Tradesmen who trust infants must do so at their own risk. In determining what may be 'necessaries,' the Courts have allowed considerable latitude, but it is obvious that if an infant has ten coats an eleventh cannot be a necessary (*Burghart* v. *Angerstein*, 6 C. P. 690). Is it competent, however, to the infant when sued to give evidence that he was already sufficiently supplied? *Ryder* v. *Wombwell* (L. R. 4 Ex. 32) decided that it was not, but this decision was not followed in *Barnes* v. *Toye* (13 Q. B. D. 410), Lopes J. very justly observing that if it were so 'the protection given to the infant would depend entirely on what might be the state of knowledge of the tradesman.' In *Johnston* v. *Marks* (35 W. R. 806) the Court of Appeal have adopted the latter view. 'The true question,' said Lindley L. J., 'is not a mere abstract one whether the articles supplied were in their nature necessaries, but a practical question whether they were necessaries for the defendant, that is *necessary to him*, and they could not be if he already had plenty of them.' Lord Esher added, 'I have a firm conviction that *Ryder* v. *Wombwell* was wrong.' This may seem to bear hardly in some cases, but the law of infants' contracts is as Lord Bramwell said in *Ryder* v. *Wombwell*, 'a law to deter people from trusting infants, and to save them from the consequences of the improvidence and inexperience natural to their age.'

To deprive an inventor of the fruits of his labour because a book in a foreign language containing an anticipation of the invention exists in the remote recesses of the British Museum Library, is or may be an evident hardship, and the Courts recognising this have in some instances refused from the mere existence of such a book to infer that it has been read so as to have become part of the common stock of knowledge (*Plimpton* v. *Malcomson*, 3 Ch. D. 531; *Plimpton* v. *Spiller*, 6 Ch. D. 412; *Otto* v. *Steel*, 31 Ch. D. 241). The recent case of *Harris* v. *Rothwell* (35 Ch. D. 416) contains a very careful review of the law on this subject. According to this decision the existence in the British Museum or other public library or the Patent Office of a book or specification describing an invention, whether in English or in a foreign language, is (without evidence of its having been sold or read) *primâ facie* evidence of prior publication; but it may be proved that the book or specification was not in fact known to be there, and its unknown existence will not then be fatal to the patent. The onus of proving non-access thus cast on the patentee is one of extreme difficulty; strict proof would be impossible, but evidence may be given which will satisfy the Court as in the cases above mentioned. The description being in an ordinary foreign language, such as German, French, or Spanish, and not in English, cannot be a ground for any substantial distinction, still less can it be considered as rendering it inaccessible, but the Court might the more readily draw the inference of the book not having been read if it was in a foreign language.

Slander of title, formerly a rare kind of action, seems now becoming more common, owing probably to competition in trade and extensive advertising. In *Hatchard* v. *Mège* (18 Q. B. D. 771) the Court had to consider whether this kind of action survives to the executor of the plaintiff; in other words,

whether it is in its nature an action for a wrong to property or person. An action for infringement of trade mark, as Chitty J. has lately decided in *Oakey* v. *Dalton* (35 Ch. D. 700; 35 W. R. 709), is an action for a wrong to property and survives. An action for slander of title is an action on the case for maliciously injuring a person in respect of his estate by decrying his goods or disparaging his title to land, and as such it also, according to *Hatchard* v. *Mège*, survives. The injury is fraudulent, and indeed is a special kind of deceit; but it is still an injury affecting definite property. The remedy by injunction under s. 32 of the Trade Marks Act 1883, against defamatory advertisements in the nature of slander of title, has been much resorted to in recent patent and trade mark cases: it is to be noted that the justification of self-defence is still preserved: the section is not to apply if the advertiser gives evidence of his *bona fides* by commencing and prosecuting with due diligence an action for infringement.

That an executor of an insolvent estate should be permitted to prefer one creditor of equal degree to another after action for administration commenced 'breaks in,' as Sir J. Leach observed in *Maltby* v. *Russell* (2 Sim. & St. 228), 'upon the ruling principle that equality is equity.' Even at law an executor could not after action brought prefer one creditor to another unless judgment was first obtained against him, but he might confess judgment (to save costs), and the advantage which a creditor could thus gain, by superior diligence at law, equity would not deprive him of. This seems (see *Waring* v. *Danvers*, 1 P. Wms. 296) to have been the explanation of the rule established by the House of Lords in *Darston* v. *Lord Orford* (Ch. Pre. 188) reversing, but without reasons, the considered judgment of the Lord Keeper Wright. At all events since *Darston* v. *Lord Orford* it has been settled law that the executor may prefer one creditor of equal degree to another at any time before judgment for administration. The late Master of the Rolls in *European Assurance Society* v. *Radcliffe* (7 Ch. D. 733) suggested that the only way to prevent such payments being made was for the plaintiff upon issuing his writ immediately to apply for and obtain a receiver. The Court of Appeal refused however in a subsequent case (*Phillips* v. *Jones*, 28 Sol. J. 360) to appoint a receiver for such a purpose, being of opinion that the jurisdiction given by the Judicature Act to appoint a receiver wherever 'just or convenient' being in aid of existing rights must be construed with reference to the existing law of the country, i.e. *Darston* v. *Lord Orford*. In the recent case of *Re Harris* (56 L. T. R. 507; 35 W. R. 710) Chitty J. felt himself obliged to refuse a similar application for a receiver, the plaintiff not having shown that the estate was being wasted. 'It is a curious state of things,' added the learned judge, 'and I do not say I approve of it, but that is the law.'

Gifts to future illegitimate children may be void on the ground either (1) of uncertainty or (2) of public policy. A gift to the future illegitimate children of a man or of a woman by a particular man cannot be ascertained because the fact of paternity cannot on grounds of public policy be inquired into. A gift to the future illegitimate children of a particular woman is, on the contrary, easily ascertainable: so is the reputation of paternity as distinguished from paternity itself. It is a more difficult question how far such gifts are 'contra bonos mores.' If the gift is by deed in favour of future illegitimate children, or by will in favour of illegitimate children to be begotten after the death of the testator, it is clearly bad, as an incentive to immorality. A gift by will to future illegitimate children to be begotten

before the testator's death stands on a different footing. It speaks only from the testator's death; till it comes into operation it is revocable and secret. When it does come into operation it is a gift in favour of a person illegitimate indeed, but in *esse*. 'If,' as James L.J. said in *Occleston* v. *Fullalove* (L. R. 9 Ch. 147), 'a man can by an attested signature made the moment before his death make validly such a disposition as that now before us' (to illegitimate children nominatim) 'of which there can be no doubt, how does any question of public policy intervene to affect the disposition which he has made some days or months or years beforehand to be produced and take effect as his last intention upon and not until the moment of his death? His own will can be no inducement to himself to continue a life of immorality.' *Occleston* v. *Fullalove* is deprived of the weight which an unanimous decision would have by the dissent of Lord Selborne; but it is still law, and as such was followed on both points by Stirling J. in the recent case of *Re Hastie's Trusts* (35 Ch. D. 728).

The case of *Baroness Wenlock* v. *River Dee Co.* (10 App. Cas. 354) was a warning to persons lending money to companies whose borrowing powers are exhausted. Money so lent would be a total loss were it not that equity has 'invented a benevolent fiction' by which the lender is entitled to be surrogated to the rights of creditors who have been paid out of such moneys and may so save a few brands from the burning. This right, first recognised in *Re Cork and Youghal Ry. Co.* (L. R. 4 Ch. 748), is not confined, as the recent case of *Baroness Wenlock* v. *River Dee Co.* (19 Q. B. D. 155) shows, to debts and liabilities of the company existing at the date of the advance, but extends to all debts and liabilities of the company paid off out of the money so borrowed whether accruing before or after the advance. Such a surrogation (if so it can be termed) does not increase the liabilities of the company, and does not therefore infringe the prohibition against borrowing: it merely substitutes one creditor for another. 'It seems,' as Lord Blackburn said in *Brooks* v. *Blackburn Benefit Society* (9 App. Cas. 866), 'to be justice; but whether it is technical equity is a question which I think is not now before the House.' According to the Court of Appeal in *Baroness Wenlock* v. *River Dee Co.* the 'benevolent fiction' is based on an imaginary transaction reminding us of the symbolic formalities of early Roman law. The *quasi* lender and the creditor of the company meet together, and a bargain is struck. The former advances to the latter the amount of his claim against the company, and takes an assignment of the claim for his own benefit; as often as a creditor of the company is paid off out of the borrowed moneys this imaginary transaction is repeated, the Court for this purpose 'closing its eyes,' as Fry L.J. remarks, to the true facts of the case. Whether the knot is worthy the intervention of such a 'deus ex machinâ' as this fiction of equity appears doubtful. It certainly seems simpler to say, as it was put in argument, that equity follows the money, and wherever it can find any security or piece of property representing the money, allows the *quasi* lender to claim it as a 'tabula in naufragio.' The company cannot of course be converted into a trustee of the borrowed money, because that would be increasing its liabilities; but it may well be treated as a trustee so far that it cannot assert any title of its own to the fruit of the money where it can be traced. If the *quasi* lender is entitled as against the company to the benefit of a debt paid out of the borrowed moneys, can he be less entitled to an estate purchased by the company out of moneys derived from the same source? If not, it would seem time that some new fiction of equity should be invented.

Another recent partnership case, *Helmore* v. *Smith*, No. 1 (35 Ch. D. 436), calls attention, by no means for the first time, to the inconvenience of the law for obtaining execution against a partner for a separate debt. Under the clumsy machinery of a *fi. fa.* the sheriff cannot seize the partner's share in the assets, but only his share in such chattels of the partnership as are seizable under a *fi. fa.* The unfortunate purchaser from the sheriff has to find out what he has really had assigned to him, and that he can only do by a partnership account. 'It is a barbarous state of the law,' observed Lindley L.J., 'the rules as to charging orders ought to apply, but they do not.' The main question argued in *Helmore* v. *Smith* as to the effect of one partner purchasing from the sheriff the other partner's share in the partnership was not decided, the purchasing partner having simplified what might otherwise have raised difficult questions, by paying for the share out of the partnership assets.

The saying of Solon, 'Call no man happy till the end,' may well apply to the vicissitudes of law as well as of life. Of the numerous decisions of the Court of Appeal recently reversed by the House of Lords, not the least important is the case of *Trevor* v. *Whitworth* (12 App. Cas. 409) as to the power of a company to purchase its own shares. In *Trevor* v. *Whitworth* the power to purchase was contained in the articles, but not in the memorandum, and was therefore on this ground *ultra vires* the company as an unauthorised trafficking in shares (its being convenient could not, as Lord Macnaghten remarked, make it incidental); but the House of Lords decided the appeal on the policy of the Companies Acts. The Legislature by the Act of 1862 granted to companies registering under it the privilege of limited liability. Having done so, it would be manifestly unjust if the company were at liberty, at its pleasure, to reduce the limited capital upon which the creditors rely and were intended to rely: the stringent provisions prohibiting or strictly circumscribing the reduction of capital sufficiently evince the policy of the Acts, and what cannot be done directly cannot be allowed to be done indirectly. A purchase by a company of its own shares, if the shares are fully paid up, is a diminution *pro tanto* of the capital by payment out of it: if the shares are partly paid up it is both a diminution *pro tanto* of capital by payment out and an extinguishment of the liability as to the amount remaining unpaid. Forfeiture or surrender of shares are in certain events unquestionably permitted, but neither of them, as Lord Herschell pointed out, involves any payment out of the funds of the company. If there are troublesome shareholders they may be bought out, but it must be done by existing shareholders, not out of the funds of the company. This view of the Companies Acts derives corroboration from the Companies Clauses Act, which expressly prohibits a company on accepting a surrender from paying or refunding to any shareholder any share of money for or in respect of the cancellation or surrender of any share. The business view is sufficiently shown by the fact that the Stock Exchange does not grant a settling day or allow a quotation to any company which purports to have the power of buying its own shares.

In connection with company law, *Ladywell Mining Co.* v. *Brookes* (35 Ch. D. 400) calls for notice. *A* buys a mine for £5000. He then forms a company, of which he becomes a director, and resells the mine to the company for £20,000 without disclosing the fact of the property being his. In such a case there is no doubt that the company is entitled, on discovering the truth, to rescind the contract; but suppose rescission to have become

by the act or default of the company impossible. Has the company any remedy at all against *A*? *Re Cape Breton Co.* (29 Ch. D. 795) answered this in the negative, and it has now been followed in *Ladywell Mining Co.* v. *Brooks*. At the time when *A* bought the mine he was not the agent of the company or in any fiduciary relation to it, a projector perhaps, but not a promoter: he clearly cannot on this ground be held accountable for the difference between the price at which he bought and sold; but *A* has been guilty of a fraud, *suppressio veri*, and there seems no reason why an action should not lie against him, not indeed for a return of profits as such under the contract, but for damages for deceit. The difference of price would then form one element in assessing the measure of damages. This was the view taken by Bowen L.J., who dissented from the judgment in *Re Cape Breton Co.* If a man who has bought a horse on a fraudulent warranty may keep the horse and bring an action for the fraud, it is not easy to see why a company that has been induced to buy a mine by fraud should be in a worse position.

It is not often that there is so marked a difference of judicial opinion as there was in *In re Arbenz' application* (35 Ch. D. 248). The bone of contention was one for which lawyers have to thank Mr. Chamberlain, and over which there have been many battles. It lay in the six well-known words of the Patents Act, 1883 (46 & 47 Vict. c. 57, sect. 64, subs. 1 (c)), 'fancy word not in common use.' Was 'Gem' a fancy word not in common use, when applied to air guns? An application for its registration was opposed by a man whose legal position was thus stated by Mr. Justice Kay: 'I, knowing perfectly well that I had no right to use the word, and that it was a name which had been selected and applied by a rival tradesman, have, behind the back of that tradesman, and in fraud of him, been selling other guns than those selected by that tradesman under this name "Gem;" and I say that I have carried on that fraud to such an extent that the name has become a common name.' Mr. Justice Kay would have nothing to do with a man who took up such a position, and averred that the name 'Gem' was common property. Accordingly he allowed the application, but the Court of Appeal laid down the rule that where a name was originally, or has come to be, descriptive of the article to which it is applied, so that while indicating what the article is, it does not connect it with any particular manufacture, such name or word cannot be registered as a trade mark. Applying this rule to the much-abused word 'Gem,' the superior Court decided that the word came within the rule, and could not be registered under the Act, because it had become descriptive of a particular pattern of gun. There could be no question that the word would originally in the English language, as applied to guns, be a fancy word; but it is unfortunately one of the words which has got a slang meaning, and we frequently hear things spoken of as 'gems' not as indicating that they have any connexion with precious stones or jewels, but simply as meaning that they are very good of their kind. The day before Lord Justice Cotton gave judgment, he read in a newspaper of a couple of dogs used by a sportsman being 'gems.' If dogs can be in common parlance gems, air guns cannot be gems only when they are manufactured by a particular firm.

A learned correspondent in New Zealand gives a reason for not greatly caring to write on Land Transfer in the Australasian Colonies, which is to our mind almost as instructive as a full article on the subject would be. He says: 'Three controversies at present pre-eminently absorb the attention

of colonial constitutional politicians, namely Federation, the abolition of the Upper Chamber in colonial legislatures, and the desirability of electing our own Governors. *The system of land transfer is not of so much interest to us, because we possess and enjoy it, and pity the countries which remain without it.*' The proof of the pudding is in the eating: here is the witness of those who eat. Whether Lord Halsbury's pudding be the same pudding, or capable of being made as good an one, is of course a distinct question.

The Association for the Reform and Codification of the Law of Nations has held its usual meeting and passed its usual resolutions. It is satisfactory that the Lord Mayor, who played the part of host this year, has since taken occasion to disclaim any sympathy with some unusually offensive language applied by Sir Wilfrid Lawson at one of the meetings to the naval and military services of the Crown. And otherwise there is no great harm to anybody. Nay, there was this time a businesslike element contributed by the Attorney-General. The suggestion of inserting an arbitration clause in treaties is one which, as regards certain kinds of treaties, may be of considerable value, and which may be found more widely practicable in the future. But no form of provision for arbitration will extinguish war and the causes of war among nations, any more than within one State similar provisions extinguish litigation and its causes among citizens. Truth is often unwelcome, but it remains true that amiable resolutions will not prevent things from being what they are. *On ne fait pas la guerre avec l'eau de rose . . . ni la paix non plus.*

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Aetius and Boniface (Edward A. Freeman)—Byzantine Palaces (J. T. Bent)—Queen Caroline in Naples (Oscar Browning)—Notes and Documents—Reviews of Books.

The Scottish Law Review. Vol. III, Nos. 31–33, for July, August, and September, 1887. Glasgow: W. Hodge & Co.

No. 31. The New Law Agents Bill—Proposed Amendment of the Law respecting Casualties of Superiority—Questions arising on the premature termination of Agricultural Leases—Notes—Reports.

No. 32. Anent Removings—Commissary Clerk's Fees in the Confirmation of Small Estates—Notes, etc.

No. 33. The Law of Trespass—Stock Exchange Contracts—Notes—Reports.

The Journal of Jurisprudence and Scottish Law Magazine. Vol. XXXI, Nos. 367–369, July, August, and September, 1887. Edinburgh: T. & T. Clark.

No. 367. Private Bill Legislation—The Crofters Commission—Bars and their Barriers, No. IV—Recent Appeals from Dean of Guild Courts—The Old Scotch Judge—Tickets (from *Harvard Law Review*)—Reviews.

No. 368. Private Bill Legislation: Standing Orders—Publication of Proceedings in Court—How I was taught History—Tickets (concluded)—Reviews, etc.

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Canada Law Journal. Vol. XXIII, Nos. 11–14, June 1 to August 1, 1887. Toronto: C. Blackett Robinson.

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The Canadian Law Times. Vol. VII, Nos. 10–12, June, July, and August, 1887. Toronto: Carswell & Co.

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The Cape Law Journal. Vol. IV, Parts 3–4. June and August, 1887. Grahamstown, Cape of Good Hope: for the Incorporated Law Society, Josiah Slater.

Part 3. The Reform Bill—Proceedings at the Annual General Meeting of the Cape Incorporated Law Society—Consideration and *Causa*—The Incorporated Law Society Amendment Bill—Miners' Obligations—The Marriage of Divorced Persons—Destruction of a Precedent—Sentences in Criminal Courts—Negligence—The late Colonial Conference—Digest of Cases—Notes, etc.

Part 4. Lord Coleridge on the Value of Clear Views upon Property—Professional Ethics: The Langworthy Case—Undue Preference—Reviews, Reports, etc.

The New Jersey Law Journal. Vol. X, No. 8 [Nos. 6 & 7 not received], August, 1887. Somerville, N. J.: Honeyman & Co.

Ethics of Democracy in New Jersey (Keasbey)—The Title to the old Burying Ground in Newark (Hayes)—Notes of Cases.

The American Law Record. Vol. XV, No. 12, June, 1887. Cincinnati: Bloch Publishing Co. [No. 11 not received.]

A National Code of Procedure (W. Reynolds, from *American Law Review*)—Reports of Cases—Current Items—Digest of Recent Decisions.

The Medico-Legal Journal. Vol. IV, No. 4, March, 1887. New York: Medico-Legal Journal Association.

Insanity and the Care of the Insane (Clark Bell)—The Expert in Court and Legislature (Dr. Giberson)—Mental Epilepsy (Dr. Baker)—Addresses of the Retiring and Incoming Presidents of the Society (Prof. Peet and Mr. Clark Bell)—Sketch of the Life of the late Dr. John P. Gray (with portrait)—Utica Asylum, N. Y. (with illustration)—Editorial Notes—Transactions of Societies—Reviews, etc.

Political Science Quarterly. Vol. II, No. 2, June, 1887. New York: Ginn & Co.

The Study of Administration (Woodrow Wilson)—The Interstate Commerce Law (E. R. A. Seligman)—How Customs Duties Work (E. J. Shriver)—Trades Union Benefit Features (E. W. Bemis)—Municipal Government (Hon. W. H. Ivins)—The 'Culturconflict' in Prussia (J. W. Burgess)—Reviews.

The Reporter. Vol. XXIII, Nos. 21–25, May 25 to June 22. Vol. XXIV, Nos. 1–9, July 6 to August 31, 1887. Boston: Houghton, Mifflin & Co.

Reports in Supreme Court, U. S. and other Courts.

Revue de Droit International et de Législation Comparée. Vol. XIX, Nos. 2 & 3. 1887. Brussels and Leipzig.

No. 2. Institute of International Law: 1887 (Heidelberg): L'église et

l'état dans l'empire franc (H. B. de la Fléchère)—Chronicle of International Events: Amérique Espagnole (P. Pradier Fodéré)—The Bulgarian Question (Rolin-Jaequemyns)—Reviews.

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Journal du Droit International privé. 1887. 14e Année. Par M. Clunet. Paris.

No. 5-6. Esquisse du droit international privé (Bar)—L'assistance judiciaire et les étrangers (Rouard de Card)—Jugements étrangers en Egypte (Vidal Bey)—Dévolution des successions d'immeubles en Turquie—Droit international privé au Chili (Fabrès)—Du port des Décorations (Lehr)—Condition en France des petits-fils de Belges (Roche)—Jurisprudence internationale. *France:* Contestations entre étrangers, Désertion, Enfant naturel, Emprunts à la grosse—Jugements étrangers, Nationalité, Pêche maritime, Régime matrimonial, Successions. *Allemagne:* Abordages, Actes de commerce, Assurances, Faillite, Marques de commerce, Sociétés étrangères. *Angleterre:* Abordages, Assurances maritimes, Compétence, Impôts, Marques de commerce, Propriété littéraire. *Belgique:* Divorce, Faillite, Immunité parlementaire, Jugements étrangers, Marques de fabrique. *Egypte:* Hypothèques, Immunité diplomatique, Juridiction des Consuls. *Espagne:* Aliments, Jugements étrangers, Testaments. *Russie:* Abordages, Avaries, Connaissements, Dispache, Pilote obligatoire. *Suisse:* Compétence, Divorce, Impôts, Jugements étrangers, Régime matrimonial, Séparations de biens, Successions—Faits et informations. *Angleterre et France:* Propriété littéraire. *États-Unis:* Nationalité, immigration. *France:* Étrangers, Expulsions.

Bulletin de la Société de Législation Comparée. Nos. 6 and 7, June and July, 1887. Paris.

The position of foreigners in Poland, before and after its partition (Lipiński)—Proportional representation in Italy (Sarraute) and Spain (Daguin)—Notes and Reviews.

Revue Internationale du Droit Maritime. Publiée par M. Autran. 3e. Année. 1887-8. Nos. 1-2. Paris: Chevalier-Marescq & Cie.

Two attempts to modify Case Law (A. de Courcy)—Insurance of the profit expected from trade or fishery: Premiums on Imports and Navigation: French and Foreign Law compared (A. Desjardins)—Reports of French, Belgian (Maeterlinck), American (F. C. Autran), Italian (V. Lebano) and Swedish (Beauchet) Cases.

Revue de la Réforme Judiciaire. Publiée par M. Jeanvrot. 3ème Année. No. 4. Chevalier-Marescq. Paris. 1887.

Reform of French Procedure (de la Grasserie)—Marriage of priests—(Chancel)—Jury reform (Dupin)—General Notes—Book Reviews—Documents, Laws and Orders—The law on primary education in Belgium (de Germon)—Book Reviews—Contents of Periodicals.

Annales de l'École libre des Sciences politiques. No. 3, July, 1887. Paris.

L'influence de J. J. Rousseau en Allemagne (Lévy-Brühl)—les Canadiens français et le développement des libertés parlementaires au Canada (Hulot)

—Deux théses de Sir H. Sumner Maine (E. Boutmy)—bibliographie des finances au XVIII^e Siècle (2^e article) (Stourm)—la mission du marquis d'Eguilles en Ecosse (1745–1746) (G. Lefèvre Pontalis)—la loi de l'enseignement primaire en Belgique (Germon)—Analyses et comptes rendus, mouvement des périodiques, etc.

Annales de droit Commercial. Publiées par M. Thaller. 1ère Année. No. 5. Paris: Arthur Rousseau. 1887.

Right of the seller to deliver on the purchaser's bankruptcy (C. Appleton) —The carrier in international law: a proposed diplomatic convention (E. Thaller)—Legal intelligence from Switzerland (F. Nessi)—Legal intelligence from Portugal (Henri Midosi)—Law Notes—Book Reviews—Reports of French Cases.

Zeitschrift für das Privat- und Oeffentliche Recht der Gegenwart. Vol. XIV, No. 4, 1887. Vienna: Alfred Hölder.

Julius Glaser (Lammasch)—Zur Nordbahn-Frage (Exner and Grünhut)—Rechtsprechung und materielle Rechtskraft (Lustkandl)—Reviews.

Centralblatt für Rechtswissenschaft. Vol. VI, Nos. 11 and 12, August and September, 1887. Stuttgart: Ferdinand Enke.

Zeitschrift für die gesammte Strafrechtswissenschaft. Vol. VII. Part 4. 1887. Berlin and Leipzig: J. Guttentag (D. Collin).

Biologie und Kriminalistik (Benedikt)—Zum ältesten deutschen Zollstrafrecht (Sickel)—Ein Beitrag zu der Lehre von der Teilnahme (Kries)—Ausländische Rundschau (Ullmann).

Archiv für Oeffentliches Recht. Vol. 2, Parts 3–4. Freiburg i. B. (J. C. B. Mohr). 1887.

Das Referendum im schweizerischen Staatsrecht II. (Hilty)—Beiträge zum Budgetrecht und zur Lehre von den formellen Gesetzen (Prazák)—Die constitutionelle Stellung des schwedischen Staatsrathes, verglichen mit derjenigen der entsprechenden Institutionen in England, Dänemark, und Norwegen (Grenander)—Zur Methodik der Sociologischen Rechtslehre (Dargun)—Reviews.

Beiträge zur Erläuterung des Deutschen Rechts. Vol. XXXI. Parts 4–5. Berlin: Franz Vahlen. 1887.

Ueber Prozessrechtliche Verträge und Kreationen (Kohler)—Wird durch die Kompensationseinrede Rechtshängigkeit begründet? Eine Erwiderung (Petersen)—Zum Begriff der Prozesskosten (Pfizer)—Von den Kosten des Kostenfestsetzungsverfahrens (Haas)—Aus dem Zwangsvollstreckungsverfahren der Reichs Civil-Prozessordnung (Hergenhahn)—§ 3. I. 24 und Anh. § 148 der preuss. allg. Gerichts-Ordnung (Rave)—Die Statutenkollision im Ehescheidungsprozess (Marcus)—Die Verzinsung des unbezahlten Kaufgeldes (Koessler)—Die Legitimation zur Bewilligung der Umschreibung einer Vormerkung in eine Hypothek im Falle eines Eigenthumswechsels (Wolff)—Reviews.

Archiv für Theorie und Praxis des Allgemeinen Deutschen Handels- und Wechselrechts. Vol. 48, Part 1. Berlin: Carl Heymann. 1887.

Ueber Bedürfniss und Inhalt eines deutschen Warrantgesetzes (Koch)—Eine Rechtsform für Koloniálgeselischaften. Betrachtungen und Vorschläge (Ring)—Das Aussonderungsrecht des Kommittenten im Konkurse des Kommissionärs vom Standpunkte des preussischen Rechts (Perl)—Autor-Patent- und Industrierecht (Kohler).

Zeitschrift für Deutschen Civilprozess. Vol. XI. Nos. 2–3, August, 1887. Berlin: Carl Heymann.

Ueber den Erwerb des Eigenthums im Falle einer Zwangsvollstreckung zur Erwirkung der Herausgabe von beweglichen Sachen gegen einen Kaufmann (Schrutka-Rechtenstamm)—Ueber die Geltendmachung des Einwands der Tilgung gegen den Kostenfestsetzungsbeschluss im Kostenfestsetzungsverfahren (Völckers)—Ueber die Zulässigkeit der Ueberweisung einer im Arrestverfahren gepfändeten Forderung (Oswalt)—Reviews.

Archivio Giuridico. Vol. 38. Nos. 5–6. Pisa, 1887.

Studii sull' 'Usucapio pro herede' (Ascoli)—Diritto amministrativo e scienza dell' amministrazione (Orlando)—Carlo Marsuppini e Giovanni Forteguerri, precursori della Scuola umanistica di Diritto romano (Chiappelli)—Dell' onere della prova nella condictio indebiti (concluded) (Longo)—Le comunità politiche di Roma antica. Il Pagus (Gaddi)—Subseciva (Brugi)—Rivista di giurisprudenza penale (Castori)—Reviews.

Rivista Italiana per le Scienze Giuridiche. Vol. III, No. 3. Ermanno Loescher & Co. 1887.

La funzione organica della società e dello stato nella dottrina di G. D. Romagnosi (Vadalà-Papale)—Delle guarentigie e formalità necessarie ad ogni specie di minori per l'esercizio del commercio (Tartufari)—Reviews.

Il Filangieri: Rivista Giuridica Italiana. Anno XII. Part I. No. 1, January (this number failed to reach us at the proper time), Nos. 6 and 8 (No. 7 not received), June and August, 1887. Milan.

Nos. 1 and 2. Come il diritto amministrativo si distingua dal costituzionale e che sia la scienza amministrativa (Codacci-Pisanelli)—Sull' articolo 2039 del Codice Civile (continued and concluded (Franceschini)—Di una nuova teoria sulla revoca degli atti fraudolenti compiuti dal debitore, secondo il Diritto romano (Ferrini)—Sulla Cambiale domiciliata (Brevi note intorno agli art. 255, 264 e 316 del Cod. di Commercio) (Franchi)—Reviews.

No. 6. Delle contravvenzioni all' articolo 14 della Legge metrica del 28 luglio 1883 (Contuzzi)—Studii sul diritto di pegno e di ritenzione (Vivante)—Reviews.

No. 8. Della camera dei Deputati nel Regno d' Italia (concluded) (Cottafavi)—Del Carattere popolare della sentenza presso i popoli di stirpe latina (concluded) (Ciccaglione).

Il Filangieri. Part II, Anno XII, Nos. 23–34, 9 June to 25 August, 1887. Milan.

These numbers consist wholly of reports of cases.

La Legge: Monitore Giudiziario e Amministrativo del regno d' Italia. Anno XXVII. Series IV, Vol. 1, Nos. 22–26, Vol. 2, Nos. 1–10.

Sulla iscrizione dell' ipoteca derivante da verbale di conciliazione formato dal conciliatore (Scevola)—Nei ferimenti seguiti da morte, non può aggravarsi la uccisione fino all' assassinio od al parricidio; ed ove siano commessi per eccesso di difesa o in seguito a provocazione vanno applicati gli art. 562 o 563 del codice penale (Stazzone)—La fideiussione considerata nei rapporti del codice civile, coi principi del diritto romano, colla dottrina e colla giurisprudenza (Corsi)—Il testamento segreto e la legge notarile (Manfredi)—I giurati ed il codice penale (Bertolini)—La personalità giuridica delle società di commercio—Reports of Cases—Reviews, etc.

Themis. Vol. XLVIII, No. 3, July, 1887. The Hague.

Strafregt en Strafvordering (Mom Visch)—Burgerlijk Regt en Regtsvordering (Biederlack)—The effect of taking an inheritance *sous bénéfice d'inventaire* on the rights of creditors (Gockinga)—The draft revised Civil Code (Land) continued—Reviews, Notes.

Rechtsgeleerd Magazijn. 6de Jaargang. Afl. 4, 5. Haarlem. 1887.

'Concurrence déloyale' in relation to the law of trade-marks (Molengraaff)—The treatment of artificial persons in the revision of the Civil Code (De Sitter)—De politieverordening tegenover den eigendom (Oppenheim)—Book Reviews, Notes, etc.

Revista Forense Chilena. Vol. II, Nos. 11–12, 1887. Santiago.

Sobre la conducta que deben guardar los jueces y magistrados en su vida pública y privada (Alonso y Colmenares)—Commentario del Titulo preliminar y del Titulo I del Libro I del Código de Comercio (José Alfonso)—Subsisten en nuestra actual legislación las disposiciones legales españolas relativas al afrontamiento de los presuntos adúlteros? (Paulino Alfonso)—Relaciones reciprocas entre la prensa y la legislación (José Larrain)—Legislación civil boliviana (Terrazas)—Sucincta reseña histórica de la constitución de la república de Chile (Huneeus)—La abuela ilegítima ú otros parientes ilegítimos (Chavarriá Contardo)—Table of Contents, Vol. II.

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